

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

272

No. 17,178

DIANA KEARNY POWELL,

Appellant,

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor
Trustee, and
ANNE T. OGDEN and LESTER H. SELLERS, Executors
of the Estate of Lucy Powell, deceased,

Appellees.

No. 17,181

EMILIA L. POWELL and
DIANA KEARNY POWELL,

Appellants,

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor
Trustee, and
ANNE T. OGDEN and LESTER H. SELLERS, Executors
of the Estate of Lucy Powell, deceased,

Appellees.

Appeals from Judgment of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 1 1962

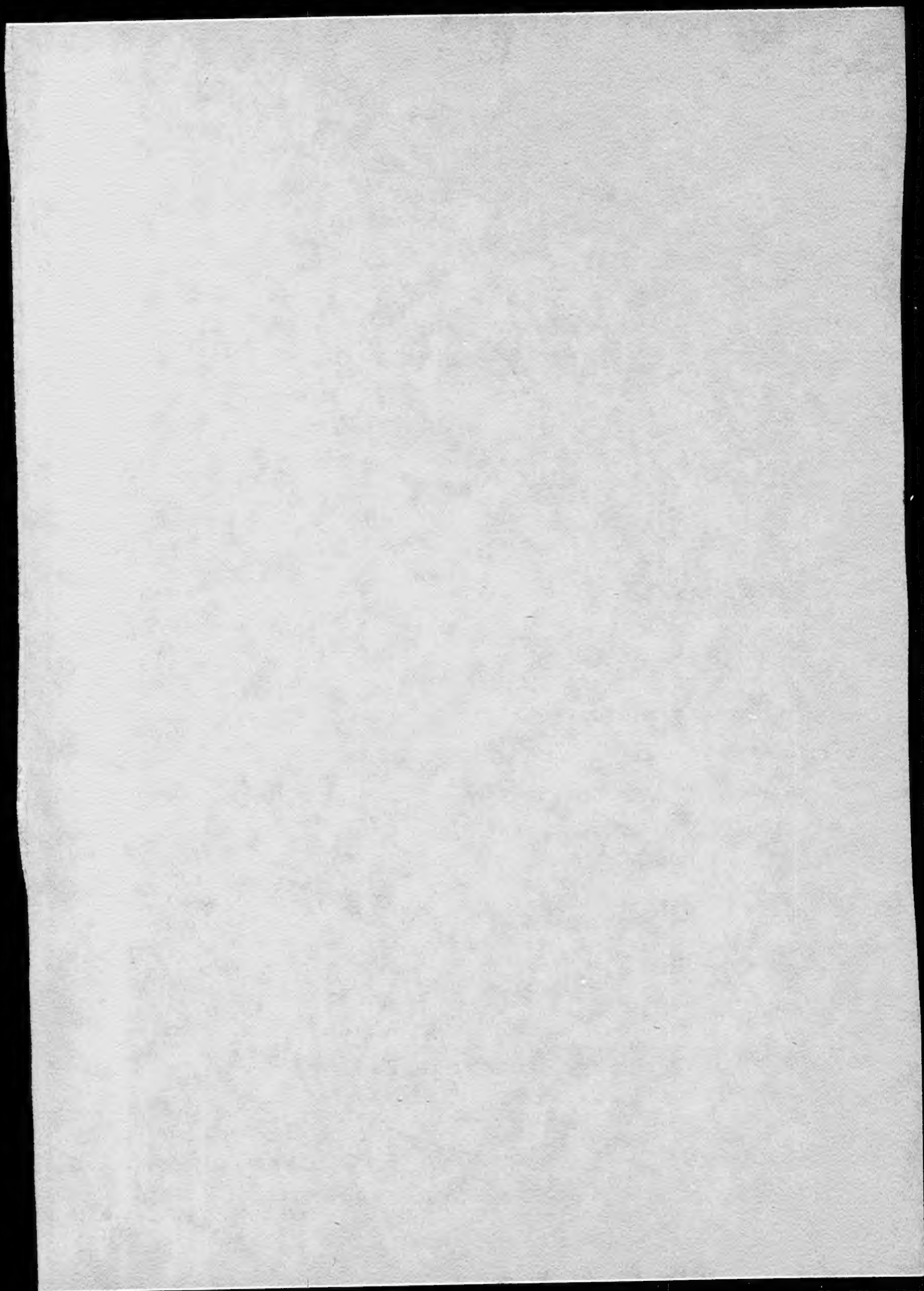
Joseph W. Stewart

CLERK

DIANA KEARNY POWELL

1500 Massachusetts Ave., N.W.
Washington, D. C.

Attorney for Appellants



(i)

STATEMENT OF QUESTIONS PRESENTED

I.

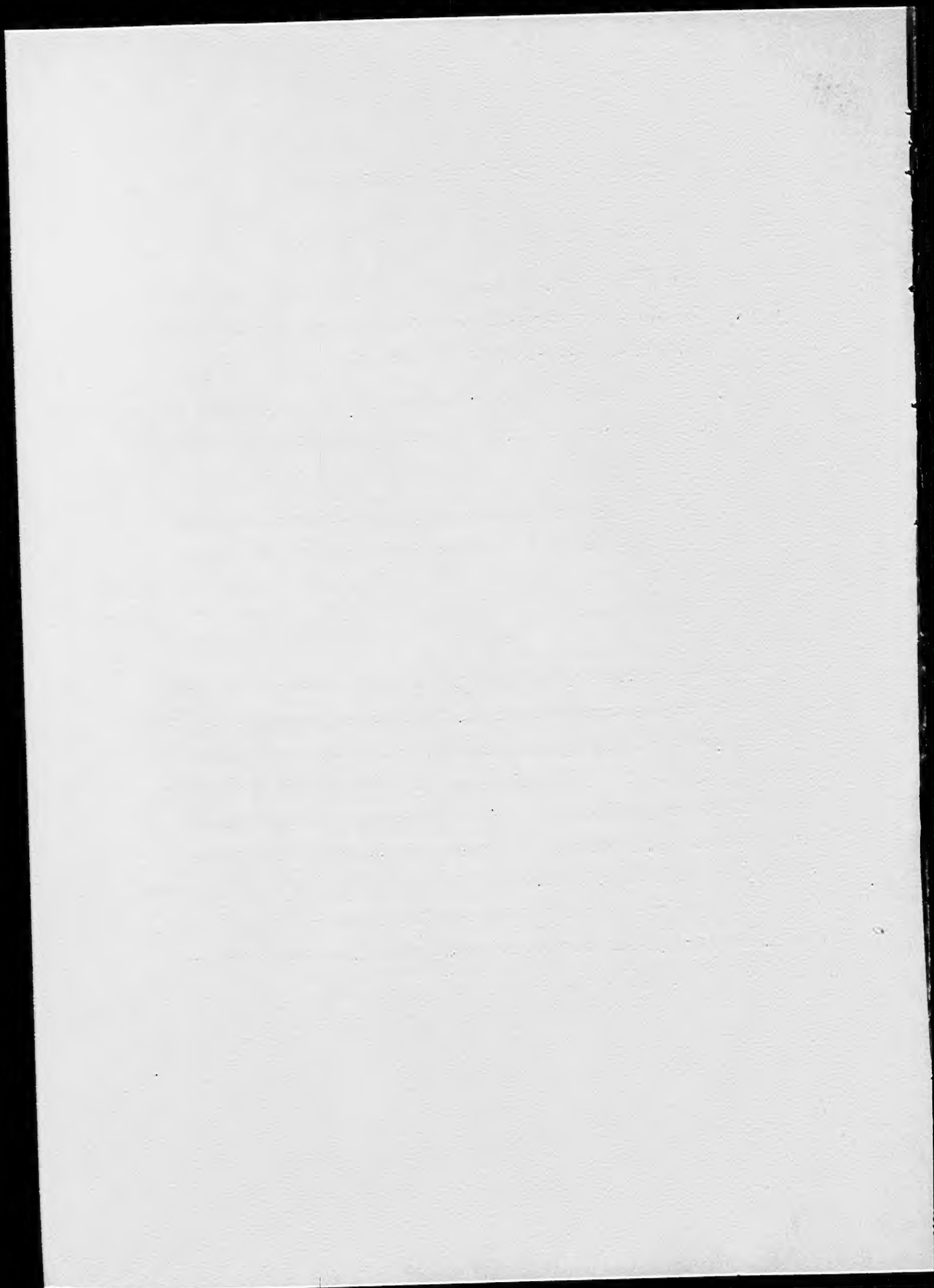
The question presented in Case No. 17,178 is which has right to appointment as administrator d.b.n., c.t.a. upon reopening of administration of an estate after the death of the executor:

(1) A successor trustee of a life trust now terminated which has itself raised a question as to the validity of the clause establishing the trust; or

(2) The only surviving next-of-kin of testatrix entitled to preference under 20 District of Columbia Code sections 20-103 and 20-205.

II.

The question presented in Case No. 17,181 is whether under the Rule in Shelley's case and 45 District of Columbia Code section 45-203, clauses in a will granting certain real estate and "all the rest and residue of my estate . . . of which I now am or at the time of my death may be seized and possessed . . . unto my said son William Glasgow Powell, and his heirs forever . . ." convey an estate of inheritance absolutely and in fee which passes on his death to his widow, or whether it vests the fee in the grantee only for the life of the cestui qui trust. Appellants submit these are classic words of art, granting an estate absolutely and in fee.



(iii)

INDEX

	<u>Page</u>
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
STATUTES AND CONSTITUTIONAL AMENDMENT INVOLVED	3
POINTS ON APPEAL	4
ARGUMENT:	
I. The Appellant, Diana Kearny Powell, as Qualified Next-of-Kin, Has a Statutory Right to Appointment As Administratrix, Which the District Court May Not Arbitrarily Deny in Favor of a Trustee Appointed Under a Void Trust	6
II. The Grant by Testatrix of Real Estate in the Third Clause, and of All the Rest and Residue of the Estate in the Fourth Clause "of Which I Now Am or At the Time of my Death May be Seized and Possessed, I Give, Devise and Bequeath Unto My Said Son William Glasgow Powell, and His Heirs Forever," and the Ruling of this Court that "These Classic Words of Art Which Have Accepted Meaning . . ." Vested the Estate "Absolutely and In Fee" at the Death of Testatrix, Created an Estate of Inheritance in William Glasgow Powell Which on His Death Passed to Appellant Emilia L. Powell as His Widow and Sole Beneficiary of His Will	7
III. The Position of the Successor Trustee is Untenable, That Its Agents, the Executors of the Estate of Lucy Powell, Are Entitled to the Remainder Estate, Since the Trust, as Well as the Remainder Estates Limited to Take Effect Upon the Termination of the Estate in Trust Pur Autre Vie of the Life Beneficiary, Lucy Powell, Are Rendered Null and Void by the Affirmance of this Court that the Will Granted an Estate in Fee Absolute Immediately Upon Death of Testatrix	9
CONCLUSION	10

TABLE OF CASES AND AUTHORITIES

	<u>Page</u>
Brooks v. DeLacy, 257 F. 2d 227, 103 U.S. App. D.C. 223	6
Farrar v. Bingham, 68 App. D.C. 93, 93 F. 2d 252	8
Haviland v. Harris, 60 App. D.C. 255, 50 F. 2d 1069	6
* Powell v. National Savings and Trust Company, et al., 296 F. 2d 412, 111 D.C. App. 290, <u>cert. den.</u> 82 U.S. 387	7, 9
* Randall v. Bockhort, 98 U.S. App. D.C. 77, 82, 232 F. 2d 334, 335	6
United States v. Hyde, D.C. Cal., 132 F. 545, 550, <u>aff'd.</u> 25 S. Ct. 760, 199 U.S. 62, 50 L. Ed. 90	8
31 C.J.S. p. 20	8

STATUTES AND CONSTITUTION

United States Code, Constitution of the United States, Amendment V	7
* District of Columbia Code, 1961 Edition:	
Title 20, Sec. 20-103	3, 6
Title 20, Sec. 20-205	4, 6
Title 45, Sec. 45-203	4, 6

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,178

DIANA KEARNY POWELL,

Appellant,

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor
Trustee, and
ANNE T. OGDEN and LESTER H. SELLERS, Executors
of the Estate of Lucy Powell, deceased,

Appellees.

No. 17,181

EMILIA L. POWELL and
DIANA KEARNY POWELL,

Appellants,

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor
Trustee, and
ANNE T. OGDEN and LESTER H. SELLERS, Executors
of the Estate of Lucy Powell, deceased,

Appellees.

Appeals from Judgments of the United States
District Court for the District of Columbia

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under the Act of October 31, 1951, c. 655, Sec. 48, 50(a), 65 Stat. 726, 727, 28 U.S.C.A. 1291,

1294, providing for appeals of right from final decisions of the United States District Court for the District of Columbia.

Appeal in Case No. 17,178 is taken from a final judgment of the United States District Court for the District of Columbia holding a probate court, entered June 6, 1962, denying Petition of Diana Kearny Powell for Letters of Administration d.b.n., c.t.a. (JA 6-9) in Administration No. 12,657, in the matter of the Estate of Diana Kearny Powell, widow, deceased.

Appeal in Case No. 17,181 is taken from a final Judgment of the United States District Court (JA 21), entered June 11, 1962, in Case No. CA 4051-55, Lucy Powell v. Diana Kearny Powell, et al., denying the Motion of defendant Emilia L. Powell for Summary Judgment (JA 19-20) under U. S. Constitution of the United States, Amendment Five.

STATEMENT OF THE CASE

Case No. 17,178 is an appeal from denial of Petition of Appellant Diana Kearny Powell (JA 1) as granddaughter and only surviving next-of-kin of Diana Kearny Powell, deceased (Adm. No. 12,657) for appointment as administratrix d.b.n., c.t.a. (JA 6-9), under 20 D.C. Code sections 20-103 and 20-205, providing a right to preference for a qualified grandchild. (Br.-3). The National Savings and Trust Company was named as an interested party, being successor trustee under an alleged grant in trust (JA 2) which grant in trust is void under the ruling that the residuary estate vested absolutely and in fee in the remainderman at the death of testatrix (JA 17-19). Appellant is the only child of William Glasgow Powell, who qualified as executor of said estate under Order of Court dated January 19, 1905 (JA 1). First and Final account were approved July 27, 1906. (JA 1) This Petition was filed after reopening of the case by the successor trustee and the decision of the United States Court of Appeals for the District of Columbia Circuit in Case No. 16,071. (JA 17-19). The National Savings and Trust Company, Successor

Trustee, opposed the Petition on the ground that it was the proper administrator of the estate. (JA 12)

Case No. 17,181 is an appeal by Emilia L. Powell, widow of William Glasgow Powell, in which she is joined by Diana Kearny Powell, from denial of her Motion for Summary Judgment (JA 19-20) on the ground that she is entitled under the ruling of this Court in Case No. 16,071 (JA 17-19) and Clauses Third and Fourth (JA 2-3) of the will of Diana Kearny Powell, to the entire residuary estate granted to William Glasgow Powell and his heirs forever. The Motion for Summary Judgment was opposed by the National Savings and Trust Company, Successor Trustee, and by Anne T. Ogden and Lester H. Sellers, Executors of the Estate of Lucy Powell, deceased, the beneficiary for life of the trust, on the ground that the decision of this Court in Case No. 16,071 rendered the clause granting the residuary estate to William Glasgow Powell and his heirs forever as null and void, by accelerating the remainder estates to vest as estates of inheritance in fee absolute immediately upon the death of testatrix. (JA 17-19).

Appeals from denial, without judicial comment, on the grounds set forth in the Points on Appeal. (Br. 5)

STATUTES AND CONSTITUTIONAL AMENDMENT INVOLVED

20 District of Columbia Code, sec. 20-103 (Administrator with the will annexed—Preference.)

In case any will admitted to probate shall not appoint an executor, or the executor therein appointed shall have died or renounced the executorship, or shall be incompetent to serve, administration shall be granted with the will annexed to the person who would have been entitled to administration in case of the intestacy of the deceased testator: Provided, however, That if there is a residuary legatee named in such will, he shall be preferred to all, except a widow . . . (Mar. 3, 1901, 31 Stat. 1236, ch. 854, sec. 298.)

20 District of Columbia Code, 1961 Ed. sec. 20-205. Persons entitled to administer—Grandchild.

If there be a widow or surviving husband and no child, the widow or surviving husband shall be preferred, and next to the widow or surviving husband or children a grandchild shall be preferred. (Mar. 3, 1901, 31 Stat. 1234, ch. 854 sec. 277, Apr. 19, 1920, 41 Stat, 561, ch. 153.)

45 District of Columbia Code, 1961 Ed., Sec. 45-203. Remainder to heirs—Rule in Shelley's case abolished.

Where a remainder shall be limited to the heirs or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons, who on the termination of the life estate, shall be the heirs or the heirs of the body of such tenant for life shall be entitled to take in fee simple as purchasers by virtue of the remainder so limited. (Mar. 3, 1901, 31 Stat. 1352, ch. 854 sec. 1027.)

United States Code, Constitution of the United States, Amendment Five:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

POINTS ON APPEAL

Appellant Diana Kearny Powell respectfully represents as points on Appeal in Case No. 17,178 that the Honorable Court erred as follows:

1. In denying this Appellant's Petition for letters of Administration d.b.n., c.t.a. in the matter of the Estate of Diana Kearny Powell, deceased, for which she had a preferred status under District of Columbia Code, Title 20, section 20-205, as only grandchild and descendant of testatrix.

2. In denying Appellant-petitioner's right to preferred status as only child of the testamentary executor, William Glasgow Powell, now deceased, for appointment as Administratrix d.b.n., c.t.a. of the Estate of Diana Kearny Powell, deceased.

3. In considering the opposition of the National Savings and Trust Company, its status as Successor Trustee being in question on the premise presented by itself and sustained by this Court, that the residuary estate of Diana Kearny Powell, deceased, vested in the remainderman, not in the trustee, thereby rendering the appointment of the Successor Trustee a nullity and the trust estate void ab initio.

Appellants Emilia L. Powell and Diana Kearny Powell respectfully represent as points on appeal in Case No. 17,181 that the Honorable Court erred as follows:

1. In denying the Motion for Summary Judgment of Emilia L. Powell as surviving widow of William Glasgow Powell, now deceased, under clause Fourth of the last will and testament of Diana Kearny Powell, deceased (Adm. 12,657 and Appeal No. 17,178) conveying the entire residuary estate to "said William Glasgow Powell and his heirs forever"; and Clause Third conveying certain real property in Cape May, New Jersey, to "William Glasgow Powell, and his heirs forever," and the decision of this Court in Case No. 16,071 holding that said estate vested immediately on the death of testatrix.

2. In considering the opposition of the National Savings and Trust Company to the Motion for Summary Judgment of Emilia L. Powell, added as a party and claiming an interest pursuant to the position of said Trust Company that the estate of Diana Kearny Powell, deceased, vested immediately upon her death, absolutely and in fee.

3. In considering the opposition of the National Savings and Trust Company to the Motion for Summary Judgment of Emilia L. Powell, the status of said Trust Company as Successor Trustee being placed in question by its own position that the residuary estate of Diana Kearny Powell, deceased, vested in the remaindermen and not in the trustee, thereby rendering the appointment of the successor trustee a nullity.

4. In considering the opposition of Anne T. Ogden and Lester H. Sellers, Executors of the Estate of Lucy Powell, deceased, to the Motion for Summary Judgment of Emilia L. Powell, claiming as widow of William Glasgow Powell, the estate of Lucy Powell having been enriched for fifty years under a void trust purportedly established under clause Fourth of the will of Diana Kearny Powell, deceased, granting the entire estate to William Glasgow Powell and his heirs forever, which this Court held in Case No. 16,071 vested at the death of testatrix Diana Kearny Powell, in William Glasgow Powell as remainderman, not as trustee.

ARGUMENT

I.

The Appellant, Diana Kearny Powell, as Qualified Next-of-Kin, Has a Statutory Right to Appointment as Administratrix, Which the District Court May Not Arbitrarily Deny in favor of a Trustee Appointed under a Void Trust.

The statutory provisions for appointment of the next-of-kin as administratrix d.b.n., c.t.a. is clearly set forth in the Code (p. 3, 4) cited above. This Court has held in Brooks v. DeLacy (1958), 257 F.2d 227, 103 U.S. App. D.C. 223) that appointment of a complete outsider as administrator is not justified. In Randall v. Bockhort, 98 U.S. App. D.C. 77, 82, 232 F.2d 334, 35, this court cites Haviland v. Harriss, 60 App. D.C. 255, 50 F.2d 1069, as follows:

"... We hold, therefore, that the court has power under section 20-204 to select an administrator from outside the immediately preferred class. The exercise of this discretion, however, must take account of the scheme of statutory preferences. The court must have a sound reason to depart therefrom. Moreover, if there is a next-of-kin who is not barred under a specific statutory disqualification and who applies for letters, a creditor or person not in any preferred classification may not be appointed. This restriction is dictated by the plain wording of Section 20-216. . . ." [Emphasis added]

In addition to the plain statement of the Code and of the Court, we have the spectacle of a trustee of a defunct trust representing that the clauses granting the estate to the trustee are without effect, and naming its own agents as remaindermen entitled to a major share of the estate as vesting adversely to the grant in trust from the death of testatrix. Powell v. National Savings and Trust Company, 82 U.S. 387, 82 U.S. 597, 296 F.2d 412, 111 D.C. App. 290. (JA 17-19).

II.

The Grant by Testatrix of Real Estate in the Third Clause, and of All the Rest and Residue of the Estate in the Fourth Clause "of Which I Now Am or at the Time of my Death May Be Seized and Possessed, I Give, Devise and Bequeath unto my said son William Glasgow Powell, and His Heirs Forever," and the Ruling of this Court That "These Classic Words of Art Which Have Accepted Meaning . . ." Vested the Estate "Absolutely and In Fee" at the Death of Testatrix, Created an Estate of Inheritance in William Glasgow Powell Which on his Death Passed to Appellant Emilia L. Powell as His Widow and Sole Beneficiary of His Will.

Appellant Emilia L. Powell, widow of William Glasgow Powell, was added as a party having an interest in the estate of Diana Kearny Powell, deceased, upon the representation of the National Savings and Trust Company, acting as trustee under a purported grant of the estate in trust, that an estate of inheritance vested immediately upon the death of testatrix. (JA 12) Appellant duly entered her appearance, taking no position as to her share in the estate, but claiming for fraudulent conversion of trust assets to the estate of Lucy Powell by executors of the estate of Lucy Powell, acting as agents of the Trustees. (JA 14-15)

Upon the finding of this Court that the residuary estate vested "absolutely and in fee," that it would take "unequivocal language to negate the use of these classic words of art which have accepted meaning and fixed legal consequences," appellant filed the motion here under

review claiming as widow of William Glasbow Powell the residuary estate granted to him. The clauses in question are as follows:

"Third: Upon the death of my said mother and the termination of her life estate hereinabove devised, or immediately upon my own death, should I survive her, I give and devise the above described property in Cape May, New Jersey, and in St. Louis, Missouri, unto my son William Glasgow Powell, and his heirs forever, . . .

"Fourth: All the rest and residue of my estate, real, personal and mixed, of whatsoever kind and description and wheresoever situate, of which I now am or at the time of my death may be seized and possessed, I give, devise and bequeath unto my said son William Glasgow Powell, and his heirs forever." (JA 2)

The classic words of art, "unto my son William Glasgow Powell and his heirs forever" establishing an estate in fee simple absolute, in real property, and the corresponding full and absolute estate in personality, an estate of inheritance, an indefeasible legal title, with full right of possession and alienation. U. S. v. Hyde, D. C. Cal., 132 F. 545, 550, affirmed 25 S. Ct. 760, 199 U.S. 62, 50 L. Ed. 90. The right of alienation is an inseparable incident to the estate in fee, and the imposition of any restraint thereon is repugnant to the estate. 31 C.J.S. p. 20. A fee simple estate must either vest or not vest, and once vested, it is indefeasible. Farrar v. Bingham, 68 App. D.C. 93, 93 F.2d 252. It is the position of this appellant, that since William Glasgow Powell was in esse and capable of taking the estate at the death of his mother on November 30, 1904, the estate vested in him absolutely and in fee at that time, and claims repugnant to the nature of the estate granted must therefore be considered as alternatives should the vesting of the estate in fee fail by the death of William Glasgow Powell prior to the death of testatrix in 1904, a contingency which did not happen.

It is the position of these appellants that upon the ruling of this court that the residuary estate vested in fee absolute, and that therefore the trust estate is void ab initio, as well as the remainder estates limited to take effect upon termination of the trust.

III.

The Position of the Successor Trustee is Untenable, That Its Agents, the Executors of the Estate of Lucy Powell, Are Entitled to the Remainder Estate, Since the Trust, As well as the Remainder Estates Limited to Take Effect Upon the Termination of the Estate in Trust Pur Autre Vie of the Life Beneficiary, Lucy Powell, Are Rendered Null and Void by the Affirmance of this Court That the Will Granted an Estate in Fee Absolute Immediately Upon Death of Testatrix.

The National Savings and Trust Company, Successor Trustee, has interpreted the will of Diana Kearny Powell, deceased, as vesting an estate of inheritance in the remaindermen, effective immediately upon the death of testatrix, the principal remainderman under their theory being their agents, the executors of the estate of Lucy Powell, the life beneficiary of the trust they were administering, now deceased, who were added as defendants by the Successor Trustee. This ignores the clauses quoted supra, which vests the estate in William Glasgow Powell and his heirs forever, the classic words under the Rule in Shelley's case to create a fee. But if this is construed as creating only an estate pur autre vie for the life of Lucy Powell, the beneficiary of the trust, it is upon these clauses that the status of the Successor Trustee and the cestui qui trust is predicated. The remainder estate, limited to take effect upon the termination of the trust, could only be accelerated by destruction of the estate created by the grant in trust, which in effect is to declare fifty years of the trust a fraud upon the remaindermen, and the appointment of the successor trustee and the creation of the trust null and void, ab initio. If the Opinion in Powell v. National Savings and Trust Company, et al., Case No. 16,071, 296 F.2d 412, 111 D. C. App. 290, cert. denied, 82 U.S. 387, rehearing denied, 82 U.S. 597, is to be given a logical application to the construction of the will, it must interpret the fee as vesting in "William Glasgow Powell and his heirs forever," and so on his death to his widow, appellant Emilia L. Powell.

CONCLUSION

Appellants submit

1. That Appellant Diana Kearny Powell in Case No. 17,178 has a statutory right to appointment as Administratrix d.b.n., c.t.a. of her grandmother, Diana Kearny Powell, widow, deceased.

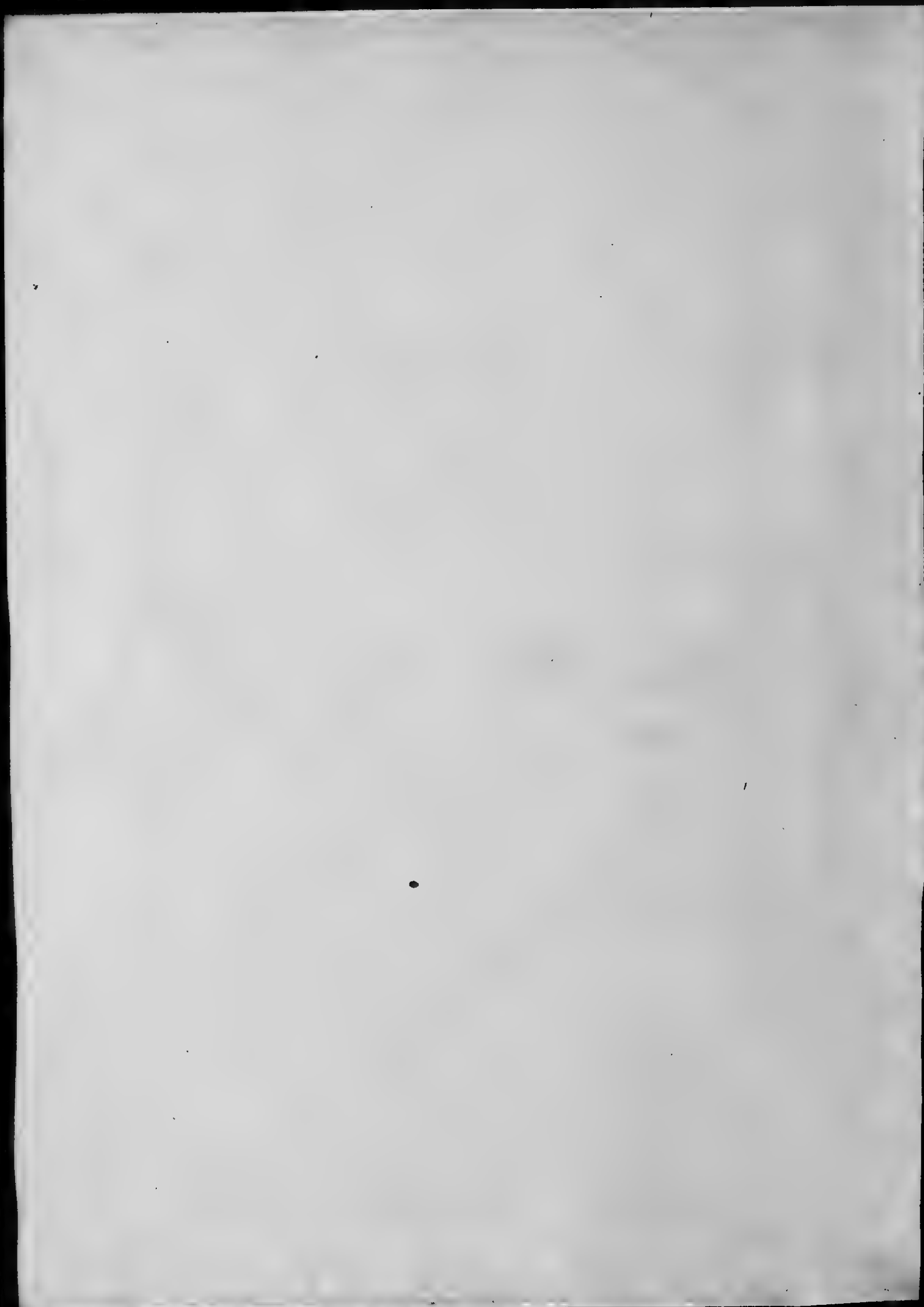
2. That Appellant Emilia L. Powell is entitled to summary judgment as widow and beneficiary of William Glasgow Powell, deceased, under the decision of this Court that the will of Diana Kearny Powell, deceased, vested the residuary estate absolutely and in fee, and the clauses of said will granting "all the rest and residue" of said estate "to my son William Glasgow Powell and his heirs forever."

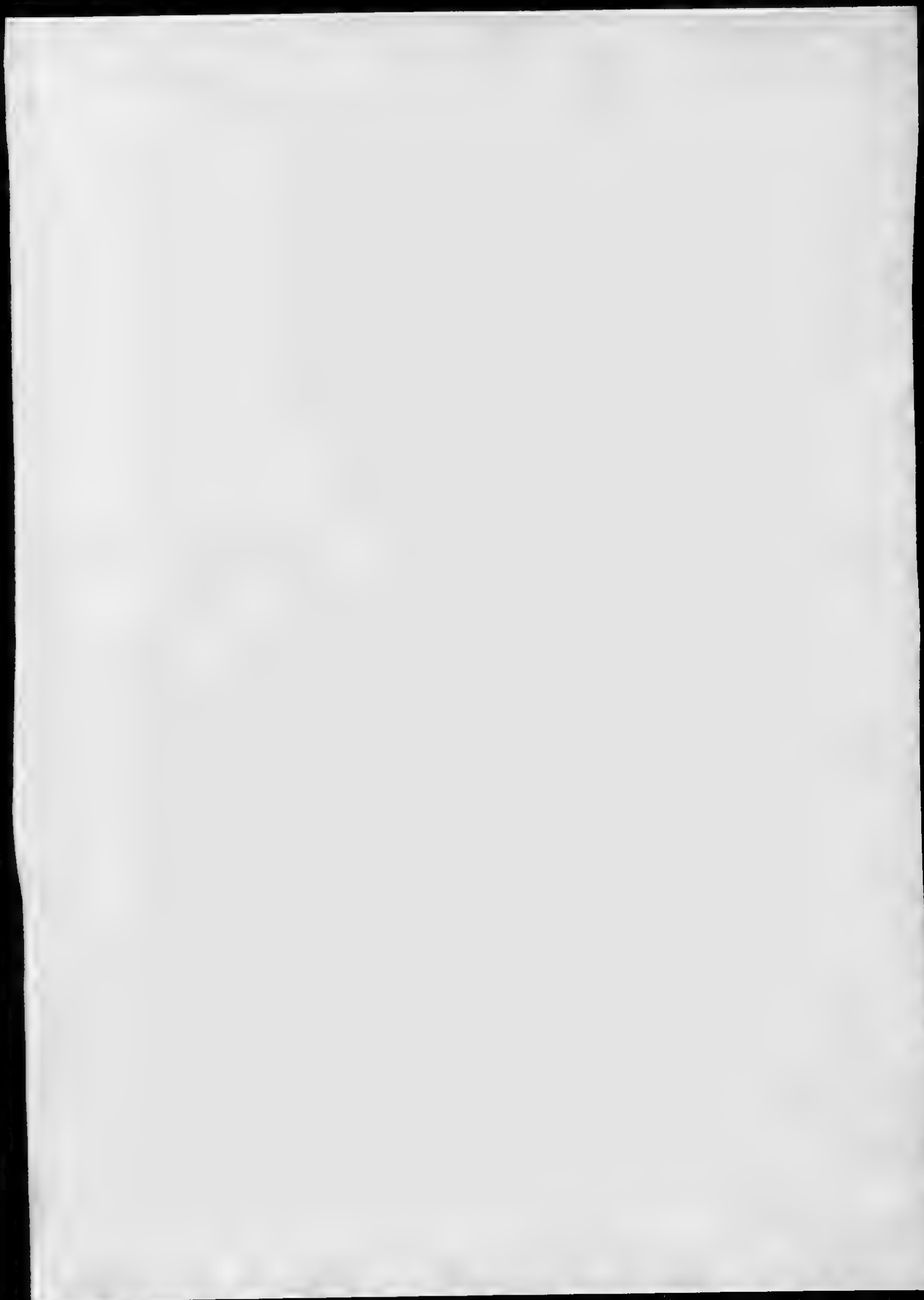
Respectfully submitted,

DIANA KEARNY POWELL

1500 Massachusetts Avenue, N.W.
Washington 5, D. C.

Attorney for Appellants





(i)

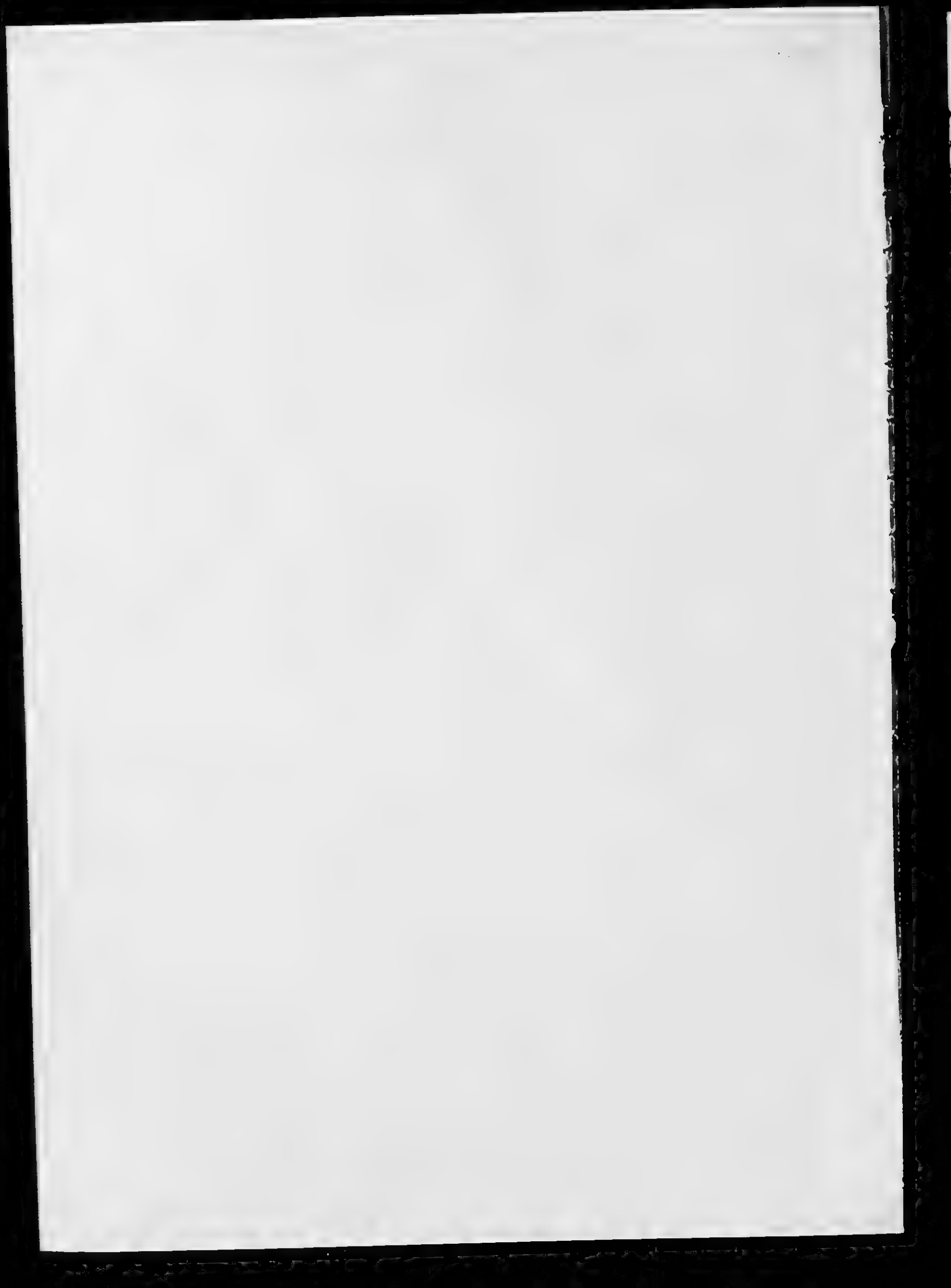
INDEX

Administration No. 12657:

	<u>Page</u>
Relevant Docket Entries	1
Last Will and Testament of Diana Kearny Powell, Widow, of Washington, D. C., Filed Jan. 11, 1905, Register of Wills, D.C.	2
Part of Petition of Executor, Filed November 20, 1905	5
Petition for Letters of Administration, D.B.N., C.T.A., Filed May 17, 1962	6
Notice of Appeal, Filed June 12, 1962	10

Civil Action No. 4051-55:

Relevant Docket Entries	11
Order Granting Motion of Trustee to Add Parties Defendant and for Instructions, Filed December 21, 1959	12
Answer of the Defendant, Emilia Lumpert Powell, Filed February 6, 1960	14
Verification of Emilia Lumpert Powell, dated February 3, 1960	16
Opinion of United States Court of Appeals for the District of Columbia Circuit, Decided July 31, 1961	17
Motion of Emilia L. Powell, for Summary Judgment, Filed December 21, 1961	19
Order Denying Motion for Summary Judgment, Filed June 11, 1962	21
Notice of Appeal, Filed June 12, 1962	21



JOINT APPENDIX
THE SUPREME COURT OF THE DISTRICT OF COLUMBIA
Holding a Probate Court

In re Estate of)	
DIANA KEARNY POWELL,)	
Deceased)	Administration No. 12657
William Glasgow Powell, Executor)	
Solicitor for Estate: Morgan H. Beach)	

RELEVANT DOCKET ENTRIES

<u>Date</u>	<u>Proceeding</u>
<u>1905</u>	
Jan. 11	Will dated May 25, 1895 and codicil dated June 27, 1902 naming William Glasgow Powell, filed. Wills #59 folio 303
Jan. 17	Petition of William Glasgow Powell for probate and record of will and codicil as to real and personal estate and for letters testamentary, filed.
Jan. 17	Waiver of five heirs-at-law and next-of-kin, filed.
Jan. 19	Order admitting will and codicil to probate and record as to real and personal estate and granting letters testamentary to William Glasgow Powell.
Jan. 20	Bond approved and letters issued.
Nov. 20	Petition of Executor and trustee for leave to distribute certain personalty, filed.
Nov. 20	Order directing Executor to distribute certain personalty.
<u>1906</u>	
July 27	First and final account of executor, showing distribution to W.G. Powell, approved and passed, Accts. # 65 folio 157.
<u>1962</u>	
May 17	Petition of Diana Kearny Powell for letters of administration d.b.n. c.t.a., filed with certificate of mailing.
May 24	Opposition of National Savings and Trust Company to petition for letters of administration d.b.n. c.t.a., filed with certificate of mailing.
June 6	Order dismissing pet. l.a. d.b.n. c.t.a., filed.
June 12	Notice of Appeal and fee, filed.

[Filed Jan. 11, 1905, Register of Wills, D.C.]

[Original will written in longhand]

LAST WILL AND TESTAMENT
OF DIANA KEARNY POWELL, WIDOW, OF
WASHINGTON, D.C.

I, Diana Kearny Powell, widow, of the City of Washington, in the District of Columbia, do make this my last will and testament:

First: I direct my executor, hereinafter named to pay my funeral expenses and debts.

Second: I give and devise unto my mother, Mrs. Diana M. Kearny, for and during her natural life, the following real estate, viz: All those certain lots and pieces of ground in the city and county of Cape May, New Jersey, which were conveyed to me by my said mother by deed of October 28, 1891, of record in the Clerk's office of Cape May County, at Cape May Court House, New Jersey, in Book 98 of Deeds, pages 455 et seq; and also all that certain tenement and parcel of ground in the city of St. Louis, Missouri, which was conveyed to me by my said mother by deed of May 20, 1895, being known and distinguished as lot forty one (41) and parts of lots forty (40) and forty-two (42) in Block Nine Hundred and Twenty Two (922) being a piece of land fronting on the south side of Pine Street fifty feet (50 ft.), by a depth of one hundred and nine 33/100 feet (109 33/100 ft.) to an alley, improved by a three story brick dwelling, known as No. 2340 Pine Street in said city of St. Louis, Missouri.

Third: Upon the death of my said mother, and the termination of her life estate hereinabove devised, or immediately upon my own death, should I survive her, I give and devise the above described property in Cape May, New Jersey, and in St. Louis, Missouri, unto my son William Glasgow Powell, and his heirs forever, in and upon the trusts hereinafter declared in the next succeeding and residuary clause hereof.

Fourth: All the rest and residue of my estate, real personal and mixed, of whatsoever kind and description and wheresoever situate, of which I now am or at the time of my death may be seized and possessed, I give, devise and bequeath unto my said son William Glasgow

Powell, and his heirs forever, in and upon the following trusts viz: first, to collect and reduce into money all the personalty and the same to safely invest, and from such investment and from the realty hereby devised, to collect the profits, income and rents, and after deducting and paying therefrom all costs and charges necessary for the preservation of the property, including taxes, levies, assessments, insurance and repairs, and his own proper expenses and commissions, secondly, to pay the net residue in equal parts semi-annually, to my two daughters, Aimee Elizabeth Powell and Lucy Powell, to each one-half, until the marriage or death of either, whichever event shall first happen, and thirdly, upon the marriage or death of one of my said daughters, then and thereafter to pay the whole of said net income, semi-annually, to the other daughter, if alive and unmarried, and upon the marriage or death of both daughters, then fourthly & finally to divide the said property absolutely and in fee, either in kind or by sale & conversion into money, equally between my children now living, viz: the said William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell, the said Aimee Elizabeth Powell and the said Lucy Powell, the descendants of any who may die before the time of division hereinbefore fixed, to have and take the share of their deceased parents, it being my intention that my said daughters shall have the whole of said net income in equal shares so long as they live and are unmarried, and upon the marriage or death of one, the whole shall then be paid to the other until her marriage or death, when the entire property is to be equally divided among my children and the descendants of any deceased child or children as hereinbefore specified.

Fifth: I nominate and appoint my said son, William Glasgow Powell, executor of this my will, and guardian of the persons of my said daughters, and direct that no security be required of him on his official bond, in either capacity; and I further empower him as Trustee to sell and convey any and all property hereby devised, without liability on the purchasers to see to the application of the purchase money, but charging

my said Trustee with the duty of reinvesting the same according to the Trusts hereof, further authorizing him to change the form of such and all investments as the best interest of my children, shall, in his judgment require.

Sixth: Should either or both of my said daughters be under age and unmarried at the time of my death, the income from the estate may be applied by my said Trustee toward their support, maintenance and education, unless means therefor be supplied from some other source, of the sufficiency of which my said Trustee shall judge; but if he do not apply such income for such purposes, he shall reinvest the same, to be paid to them upon attaining full age, as above directed.

In Testimony, whereof, I have hereto subscribed my name and affixed my seal in the City of Washington, District of Columbia, this twenty fifth (25th) day of May, 1895.

/s/ Diana Kearny Powell (SEAL)

Signed, sealed, published and declared by the above named testatrix, Diana Kearny Powell, as and for her last will and testament in our presence, who, in her presence and at her request, and in the presence of each other have hereunto subscribed our names as attesting witnesses.

dead /s/ Reginald Fendall

/s/ Leonard J. Mather

/s/ Morgan H. Beach

I, DIANA KEARNY POWELL, being of sound and disposing mind, do publish and declare this as a codicil to my last will and testament, revoking said last will and testament, insofar as it is inconsistent with this codicil.

1st. If the income from my estate left to my two daughters Aimee Elizabeth & Lucy, amounts to exceed Eighteen Hundred Dollars (\$1800) I direct that one-half of the said income, be paid to each separately & not to them jointly, as provided in my last will & testament-

2nd. If, on the death or marriage of either of my said daughters, Aimee Elizabeth & Lucy, the income left to the other under the terms of my last will & testament, exceeds the sum of Twelve Hundred Dollars (\$1200) I direct that the amount (\$1200) be all that shall be paid to such daughter as may be entitled to the income under my last will & testament, & the surplus of my income over the said sum of Twelve Hundred Dollars (\$1200) be divided equally among such other of my children, as may be alive at such distribution and their heirs -

/s/ Diana Kearny Powell

Diana M. Kearny

Therese L. Coles

Lucy Minnegerode

Cape May, New Jersey

June 27, 1902

[Filed November 20, 1905]

PART OF PETITION OF EXECUTOR

Agreement made this first day of August, A.D. 1905 by and between Owen Bullitt Powell of Philadelphia, Pa., George Cuthbert Powell of the United States Army, Aimee E. Powell and Lucy Powell of the District of Columbia, and William Glasgow Powell of the United States Marine Corps, Witnesseth:

Whereas the parties hereto are all the heirs at law and next of kin of their mother Diana K. Powell late of the District of Columbia and are all of full age and,

Whereas the said Diana K. Powell by her last will and testament dated the 25th day of May, A.D. 1895 and by her codicil thereto dated the 27th day of June, A.D. 1902, and duly admitted to probate in the Supreme Court, District of Columbia, holding a special term as a probate court on the 19th day of January, A.D. 1905, devised and bequeathed all of her personal estate to said William Glasgow Powell

in trust to sell the same and invest the proceeds and to apply the income thereto for the benefit of certain of the parties to this agreement, and . . .

Now therefore, It is hereby agreed by and between the parties hereto that the articles mentioned in said memorandum shall be distributed by the said William Glasgow Powell, executor and trustee as aforesaid, to persons designated in the said memorandum.

Witnesses as to Owen Powell:	/s/ Owen B. Powell (Seal.)
/s/ Andrew D. McKenna	
as to G. Cuthbert Powell:	/s/ G. Cuthbert Powell (Seal)
/s/ Theodor F. King, Jr.	
as to Aimee E. Powell and Lucy Powell:	/s/ Aimee E. Powell (Seal)
/s/ Samuel F. Eldredge	/s/ Lucy Powell (Seal)
as to Wm. Glasgow Powell:	/s/ Wm. Glasgow Powell (Seal)
/s/ J.H. De Meritt	

[Filed May 17, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Probate Court

In re Estate of)	
DIANA KEARNY POWELL,)	Administration No. 12657
Deceased)	

PETITION FOR LETTERS OF ADMINISTRATION,
D.B.N., C.T.A.

The petition of Diana Kearny Powell, granddaughter of the decedent herein, respectfully represents to this Honorable Court:

1. Petitioner is a citizen of the United States residing at 1500 Massachusetts Avenue, N.W., in the District of Columbia, is an adult and not under any legal disability, is a member of the bar of this

Court actively engaged in the practice of law, and files this petition as the only surviving descendant and next-of-kin of the above-named decedent.

2. The decedent Diana Kearny Powell, grandmother of the petitioner herein, died a widow and testate on November 30, 1904, leaving as surviving next-of-kin her mother, Diana M. Kearny and five adult children, namely: (1) William Glasgow Powell, (2) Owen Bullitt Powell, (3) George Cuthbert Powell, (4) Aimee Elizabeth Powell, and (5) Lucy Powell, who were her only descendants. Thereafter, on April 15, 1910, petitioner herein, Diana Kearny Powell, was born and is the only child and descendant of William Glasgow Powell; and on June 24, 1913, Owen Bullitt Powell, Jr., was born and was the only child and descendant of Owen Bullitt Powell. Said Owen Bullitt Powell, Jr. died on July 15, 1935, unmarried and childless, predeceasing his father.

3. Under the above-entitled administration, decedent's will was probated in this Court, each of the above-named next-of-kin then in being consenting thereto, and final distribution was made thereunder to William Glasgow Powell as testamentary executor and trustee. Under the trust established by the will, the entire estate was administered first for the use of Diana M. Kearny, mother of the decedent, until her death in 1906 (at which time said Diana M. Kearny was survived by numerous descendants in addition to those herein named), and thereafter said estate was administered for the joint use of Aimee Elizabeth Powell and Lucy Powell, the trust to be finally terminated by the death or marriage of both daughters. Upon termination of the trust by the marriage or death of both daughters, the entire estate was to be finally distributed by dividing the estate equally among decedent's five children, the descendants of any child or children dying before termination of the life estate and final division to take the share of the deceased parent.

4. The named beneficiaries died in the following order: (1) Owen Bullitt Powell, on March 26, 1936, survived by a widow, his only son and descendant (by an earlier marriage) Owen Bullitt Powell Jr., predeceasing him on July 15, 1935, unmarried and childless; (2) Aimee

Elizabeth Powell, on February 16, 1941, unmarried and childless; (3) George Cuthbert Powell, on February 3, 1943, a widower and childless; (4) William Glasgow Powell, on May 11, 1955, survived by a widow and petitioner herein, Diana Kearny Powell, his only child by a former marriage, at which time the National Savings and Trust Company was appointed Successor Trustee by this Court in Civil Action No. 4051-55, to continue the administration of the trust for the benefit of Lucy Powell, the only survivor of the five children named as remaindermen, and the only survivor of the two daughters named as trust beneficiaries; and (5) Lucy Powell, on September 1, 1958, unmarried and childless. Petitioner is, therefore, the only descendant and next-of-kin of decedent Diana Kearny Powell and of William Glasgow Powell, the testamentary executor and trustee, and further, petitioner is the next-of-kin of each of the other beneficiaries, being the only niece of the full blood. Descendants of decedent's husband, Robert Randolph Powell, by his first marriage, are unrelated to decedent, the second wife, and have no claim through Robert Randolph Powell, who died in 1883. They are nieces and nephews of the half blood of decedent's five children and cousins of petitioner. None are residents of the District of Columbia.

5. Successive reports of the Successor Trustee show the assets of the estate approximately as follows (in rounded figures to account for changes in value):

2/3 share of personalty retained by the Successor Trustee as follows:

Cash, invested in short-term treasury notes (bonds) approximately	\$10,000.00
Stocks, approximately	9,000.00

1/3 share of personalty distributable under Order of Court dated April 15, 1959 to this petitioner, Diana Kearny Powell as follows:

Stocks (transferred on books, but retained by the Successor Trustee)	4,269.13
Cash	\$4,647.09
Trustee's Commission withheld	<u>469.28</u>
	<u>5,179.48</u>
	<u>\$28,448.51</u>

Real estate known as Block 62, Lot 10, improved by premises 824 Stockton Avenue, Cape May, New Jersey, is also retained by the successor trustee, and carried at \$3,550.00. There are no known incumbrances other than the claims through this estate. Damage by the recent hurricane is reported as slight. This real estate has also been estimated as valued at \$20,000.00, and has potential value as a source of rental income, although not used for that purpose in recent years. Petitioner has received offers both for purchase and rent of these premises, which are located a block from the beach.

6. In addition to assets shown on the reports of the trustee, personal property consisting of good quality furniture, family portraits, and furnishings, listed in the original inventory and in lieu of sale, retained by agreement by the life beneficiaries, estimated at approximately \$5,000.00, are claimed by petitioner as assets of the estate.

7. Petitioner represents that the authority of the National Savings and Trust Company as successor trustee ended with the termination of the trust by the death of Lucy Powell on September 1, 1958, and that it has improperly retained custody of the assets and assumed the role of administrator without authority to the detriment of the estate, thereby rendering necessary the reopening of this estate for administration of final distribution.

WHEREFORE, the premises considered, petitioner prays:

1. That letters of administration d.b.n., c.t.a. be granted to this petitioner.

2. That your petitioner be permitted to qualify by giving an undertaking in the sum of \$1,000.00 only.

3. That the Court grant petitioner such other and further relief as to the Court may seem just and proper.

/s/ Diana Kearny Powell

DISTRICT OF COLUMBIA, SS:

Diana Kearny Powell, being first duly sworn, deposes and says that she had read the foregoing petition by her subscribed and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated on information and belief, and that as to those matters she believes it to be true.

/s/ Diana Kearny Powell

Subscribed and sworn to before me this 16th day of May, 1962.

/s/ Mary J. Brumley
Notary Public, D.C.
My commission expires 9/14/62

(SEAL)

/s/ Diana Kearny Powell
Attorney at Law
1500 Massachusetts Avenue, N.W.
Washington, D.C.

[Certificate of Service]

[Filed June 12, 1962]

NOTICE OF APPEAL

Notice is hereby given this 12th day of June, 1962, that petitioner DIANA KEARNY POWELL hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 6th day of June, 1962 denying Petition for letters of administration d.b.n., c.t.a.

/s/ Diana Kearny Powell
Petitioner
* * *

Opposing Petition:

Henry H. Paige, Esq., for the National Savings and Trust Co.,
Successor Trustee, 312 Colorado Bldg., Washington 5, D.C.

Benjamin W. Dulany, Esq., for Executors of the Estate of Lucy
Powell, deceased, 822 Southern Bldg., Washington 5, D.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LUCY POWELL,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 4051-55
)	
DIANA KEARNY POWELL)	
OWEN BULLITT POWELL)	
GEORGE CUTHBERT POWELL,)	
)	
Defendants)	

DOCKET ENTRIES
[Relevant entries only]

<u>Date</u>	<u>Proceedings</u>
<u>1955</u>	
Sept. 13	Complaint, appearance, Exhibit A.
<u>1959</u>	
Dec. 21	Order granting Motion of trustee to add following-named persons as parties defendant and for instructions: #4, Milda Becker Powell; #5 Anne T. Ogden and Lester H. Sellers, ancillary executors of the will of Lucy Powell, deceased; #6 Emilia Lumpert Powell; #7 Elizabeth Powell Adams; #8 Adelle Powell Marbut; #9 Annette Powell; #10 Robert Randolph Powell, Jr.; #11 Mary Powell Davidson; #12 Martha Powell Nistler; #13 Ann Powell Howe; #14 Shirley Randolph Turner, Jr.; #15 Charlotte T. Turner; #16 Beverley T. Bailey; #17 Joyce T. Klein; #18 Gertrude T. Schnoburger; #19 Mary Turner Thomas; #20 Marietta Turner Cogswell; #21 The unknown heirs at law and next of kin, alienees and devisees of Charles Hunt Powell, Mary Hunt Powell, and Shirley Randolph Turner, deceased. Walsh, J. (N).
Dec. 23	Summons, copy, and copy of motion and order issued to defendants 5 ser. 12-24.
Dec. 23	Summons copies (17) and copies (17) of motion and order issued to defs. 4, 6-21 incl. All not found 1-13-60.
<u>1960</u>	
Feb. 6	Answer of Deft. #6 and verification, filed 2-6-60.
Oct. 5	Order granting Motion of Successor Trustee for Summary Judgment. Holtzoff, J. (N).

<u>Date</u>	<u>Proceedings</u>
<u>1961</u>	
Dec. 21	Motion of Emilia L. Powell, deft. #6 for Summary Judgment c/s 12-21-61.
Dec. 28	Opposition of National Savings and Trust Co., Successor Trustee, to Motion of Emilia L. Powell for Summary Judgment c/m 12-28-61, filed.
Dec. 28	Opposition of Ancillary Executors of the Estate of Lucy Powell, deceased, to Motion of Emilia L. Powell for Summary Judgment c/m 12-26-61, filed.
<u>1962</u>	
June 11	Order denying Motion of defendant Emilia L. Powell for Summary Judgment, Curran, J. (N).
June 12	Notice of Appeal.

[Filed December 21, 1959]

**ORDER GRANTING MOTION OF TRUSTEE TO ADD
PARTIES DEFENDANT AND FOR INSTRUCTIONS**

Upon consideration of the motion of National Savings and Trust Company, Successor Trustee, to add parties defendant and for instructions, it is by the Court this 21st day of December, 1959,

ORDERED, as follows:

1. That the following named persons be and they hereby are made parties defendant hereto:

- a. Milda Becker Powell,
individually and as executrix under the
will of Owen Bullitt Powell, deceased
St. Jacob, Illinois
- b. Anne T. Ogden and Lester H. Sellers,
Ancillary Executors of the will of
Lucy Powell, deceased,
c/o Benjamin W. Dulany, Esquire
822 Southern Building
Washington 5, D.C.
- c. Emilia Lumpert Powell
Vence
Alpes Maritimes, France

- d. Elizabeth Powell Adams
7365 Westmoreland Drive
St. Louis, Missouri
- e. Adelle Powell Marbut
1304 Gimblin
St. Louis, Missouri
- f. Annette Powell
1304 Gimblin
St. Louis, Missouri
- g. Robert Randolph Powell, Jr.
304 South Main Street
St. Charles, Missouri
- h. Mary Powell Davidson
High Ridge, Missouri
- i. Martha Powell Nistler
Baptist Church Road
Afton, Missouri
- j. Ann Powell Howe
1610 Hammond
Superior, Wisconsin
- k. Shirley Randolph Turner, Jr.
1515 Nicklin Avenue
Piqua, Ohio
- l. Charlotte T. Turner
2902 Lawndale Avenue
Cincinnati 13, Ohio
- m. Beverley T. Bailey
141 East 61st Street
New York, New York
- n. Joyce T. Klein
20 Kent Road
Great Neck, Long Island
- o. Gertrude T. Schnoburger
c/o Joyce Turner Klein
20 Kent Road
Great Neck, Long Island
- p. Mary Turner Thomas
Meadowoods Road
Essex, Connecticut

- q. Marietta Turner Cogswell
684 Third Avenue
Williamsport, Pennsylvania
- r. The unknown heirs at law and next of kin,
alienees and devisees of Charles Hunt
Powell, Mary Hunt Powell, and Shirley
Randolph Turner, deceased.

2. That a summons herein together with a copy of said motion and a copy of this order shall be served by the U.S. Marshal on such of said defendants as may be found within the District of Columbia, and that as to such of said defendants as are not to be found, service by publication shall be had.

By the Court:

/s/ Leonard P. Walsh
Judge

[Filed February 6, 1960]

**ANSWER OF THE DEFENDANT
EMILIA LUMPERT POWELL**

Comes now the defendant Emilia Lumpert Powell by her attorney and respectfully shows to the Court as follows:

I.

That she is the defendant made a party to the above-entitled cause by Order entered December 21, 1959, that she is an American citizen, and that she resides at Le Bastidon, chemin des Racines, Antibes, Alpes Maritimes, France, and that she is of age and otherwise sui juris;

II.

That she is the widow of William Glasgow Powell, a remainderman and residuary beneficiary of the Last Will and Testament and Codicil of the testatrix Diana Kearny Powell, deceased, and that she is the executrix and beneficiary of an unprobated will of said William Glasgow Powell, who at the time of his death on May 11, 1955, was heir at law and next of kin of the testatrix Diana Kearny Powell, deceased,

his mother, and of the named remaindermen and residuary beneficiaries of said testatrix Diana Kearny Powell, namely: Owen Bullitt Powell, George Cuthbert Powell, Aimee E. Powell, and Lucy Powell, each of whom died without surviving issue;

III.

That said defendant Emilia Lumpert Powell takes no position as to her share in the remainder estate of Diana Kearny Powell, testatrix, who was her mother-in-law and to whom she is not related by blood, but leaves to the sound discretion of the Court upon the pleadings and evidence heretofore filed the extent of her right, title, or interest, if any, in the remainder estate and/or in the residuary estate under the Codicil of said Diana Kearny Powell, testatrix, either as widow or under the unprobated will of said William Glasgow Powell, deceased remainderman and residuary beneficiary of the trust estate herein sought to be distributed;

IV.

That said defendant Emilia Lumpert Powell joins with her step-daughter the defendant Diana Kearny Powell in the Cross-Claim heretofore filed in this cause by said defendant Diana Kearny Powell on behalf of herself and on behalf of Owen Bullitt Powell and George Cuthbert Powell and their heirs at law and next of kin and on behalf of any person or persons entitled through them or any of them to take any part of the estate of Diana Kearny Powell, deceased, for fraudulent conversion of trust assets to the estate of Lucy Powell by Anne T. Ogden and Lester H. Sellers, Executors of Lucy Powell, acting as agents of the Trustee and Successor Trustee:

WHEREFORE, the defendant Emilia Lumpert Powell prays this Honorable Court for such relief as the Court may deem just and proper upon consideration of all the pleadings and evidence, and for costs and attorneys fees.

/s/ Diana Kearny Powell
Attorney for the Defendant
Emilia Lumpert Powell

/s/ Emilia Lumpert Powell, Defendant
Le Bastidon
Chemin des Rastinan
Antibes, Alpes Maritimes
France

VERIFICATION OF EMILIA LUMPERT POWELL
DATED FEBRUARY 3, 1960

Republic of France :
 Dept. of Maritime Alps : SS.
 City of Nice :
 Consulate of the United States of America :

Emilia Lumpert Powell, being on oath, deposes and says that she had read the foregoing Answer of the Defendant Emilia Lumpert Powell by her subscribed and annexed hereto, and that the statements therein are true to the best of her knowledge and belief.

/s/ Emilia Lumpert Powell (Seal)

Subscribed and sworn to before me, this 3rd day of February, A.D. 1960.

/s/ J. Thomas McAndrew
 Vice-Consul of the United States
 of America

SEAL.

Post: Nice, France, Dare 3 Feb. 1960
 Service No. 180
 Tariff No. 45
 Fee Paid: U.S. \$2.50
 Local currency equivalent: NF 12.40

[Decided July 31, 1961]

17

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

*

*

*

No. 16071

Before: Wilbur K. Miller, Chief Judge, and Prettyman and
Burger, Circuit Judges.

Burger, Circuit Judge: Appellant seeks review of a judgment of the District Court construing a testamentary trust pursuant to a petition of the trustee for instructions.

In 1958 the last surviving of five life tenants of the trust estate died and the appellee trustee was required to make final distribution under a residuary trust provision contained in a will executed in 1895. Under the terms of the trust one-half of the trust income was given to each of two daughters of testatrix for life or until marriage,

and upon the marriage or death of both daughters, then fourthly & finally to divide the said property absolutely and in fee, . . .

equally between my children now living, viz: the said William Glasgow Powell, Owen Bullitt Powell, George Cuthbert Powell, the said Aimee Elizabeth Powell and the said Lucy Powell, the descendants of any who may die before the time of division hereinafter fixed, to have and take the share of their deceased parents, it being my intention that my said daughters shall have the whole of said net income in equal shares so long as they live and are unmarried, and upon the marriage or death of one, the whole shall then be paid to the other until her marriage or death, when the entire property is to be equally divided among my children and the descendants of any deceased child or children as hereinbefore specified. (Emphasis added.)

Four of the five children of the testatrix died, without issue surviving, prior to the time of distribution. Appellant is the sole surviving child of William G. Powell, the last survivor of testatrix' five children.

The trustee's request for instructions recited that upon appellant's filing a motion for distribution of the entire estate to herself as the sole surviving descendant of the testatrix, the trustee was unable to determine from the will whether it was to be construed as claimed by appellant or whether it should be construed as giving each of the five children a vested remainder in fee in one-fifth of the trust estate subject to being divested only by his or her death leaving issue prior to the termination of the life estate.

We hold that the will discloses an intent to vest each of the five children with an equal share of the residue "absolutely and in fee," subject only to the life estates of the daughters on the terms described and subject to being divested only if they predeceased the life tenants and were survived by issue.

In Pyne v. Pyne, 81 U.S. App. D.C. 11, 154 F. 2d 297 (1946), we held that unless both conditions, death of the remainderman during the preceding life estate and survival of issue of the deceased remainderman are met, the remainderman has a vested interest which passes by his will or by statute as the case may be. See also Scott v. Powell, 86 U.S. App. D.C. 277, 182 F. 2d 75 (1950); Episcopal Eye, Ear and Throat Hospital v. Goodwin, 107 U.S. App. D.C. 375, 278 F. 2d 255 (1960).

It is suggested by the dissent that this view ignores the testatrix' express intention which is articulated following the vesting clause "to divide the said property absolutely and in fee, . . . equally among my children now living. . ." We hold simply that it would take strong and unequivocal language to negate the use of these classic words of art which have accepted meaning and fixed legal consequences. Read as Judge Prettyman reads it, the second part of the sentence is not an explanation but a repudiation of the vesting clause. It should be noted that the explanation or expression of intent which follows the vesting clause, is in turn qualified by the phrase "as hereinbefore specified" which completes the circle and takes us back to the vesting language "absolutely and in fee."

It is no help in the process of searching for intent to look to un-anticipated events to prove that the testatrix could not have meant what she said by the words "absolutely and in fee." Of course she had no way of knowing in 1895 that four of her five children would die without issue. But we cannot predicate our construction of the will on what happened over the 63 years intervening between the date of the will and death of the last of five vested remaindermen. Nor can we give such weight as is urged to the "blood line" argument, for if each of her children had been survived by one child those children could have freely distributed this property outside the blood line. That events did not develop as the testatrix probably thought they would does not give us freedom to construe her will now as we think she ought to have written it had she been able to peer 63 years into the future.

Affirmed.

[Filed December 21, 1961]

MOTION OF EMILIA L. POWELL
FOR SUMMARY JUDGMENT

Comes now the defendant Emilia L. Powell, and respectfully moves this Honorable Court for summary judgment in her favor, and claims that she is entitled to the entire remainder estate of Diana Kearny Powell, deceased, on the following grounds:

1. This defendant is the widow of William Glasgow Powell, entitled to his entire estate under his unprobated will.

2. That said William Glasgow Powell died on May 11, 1955, seized in fee simple absolute of an entire undivided share of the estate of his mother, Diana Kearny Powell, deceased, under her will, Administration No. 12,657 in this Court, and that the United States Court of Appeals for the District of Columbia Circuit has so held in Case No. 16,071, Diana Kearny Powell v. National Savings and Trust Company, Successor Trustee.

3. That it is contrary to the nature of an estate in fee absolute to be subject to divestment upon a condition subsequent, and that therefore the ruling of the court as to the divesting of the interest of William Glasgow Powell upon his death with issue is of no effect as against her claim.

4. That the shares of Owen Bullitt Powell, George Cuthbert Powell, and Aimee Elizabeth Powell were held as joint tenants and reverted to William Glasgow Powell upon their death.

5. That the defendant Emilia Lumpert Powell and her predecessor in interest, William Glasgow Powell, were prevented from asserting their claim to the estate in fee by the misrepresentation of co-tenant Lucy Powell, now deceased, her agents and executors in concealing this defendant's interest and fee simple estate.

WHEREFORE, the defendant Emilia L. Powell prays this Honorable Court to award to her the entire estate of Diana Kearny Powell, deceased, absolutely and in fee, with accrued interest and income from the time of vesting in William Glasgow Powell on the death of the testatrix Diana Kearny Powell, deceased.

/s/ Diana Kearny Powell
 Attorney for Emilia Lumpert
 Powell
 * * *

[Certificate of Service]

[Filed June 11, 1962]

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Upon consideration of the motion for summary judgment filed herein on behalf of Emilia L. Powell, the memoranda of points and authorities in opposition thereto, and the arguments of counsel in open Court, it is by the Court this 11th day of June, 1962,

ORDERED, that said motion for summary judgment filed herein on behalf of Emilia L. Powell be, and the same hereby is denied.

/s/ Edward M. Curran
Judge

[Filed June 12, 1962]

NOTICE OF APPEAL

Notice is hereby given this 12th day of June, 1962, that the defendants EMILIA L. POWELL and DIANA KEARNY POWELL, hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 11th day of June, 1962, denying the Motion of Defendant Emilia L. Powell for summary judgment.

/s/ Diana Kearny Powell
Attorney for Emilia L. Powell
and
Diana Kearny Powell

[Certificate of Service]

**BRIEF FOR APPELLEE NATIONAL SAVINGS AND
TRUST COMPANY, SUCCESSOR TRUSTEE**

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,178

DIANA KEARNY POWELL, *Appellant*

vs.

NATIONAL SAVINGS AND TRUST COMPANY,
Successor Trustee, *Appellee*

No. 17,181

EMILIA L. POWELL, et al., *Appellants*

vs.

NATIONAL SAVINGS AND TRUST COMPANY,
Successor Trustee, et al., *Appellees*

Appeals from Final Orders of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 5 1962

Joseph W. Stewart
CLERK

ARTHUR P. DRURY

JOHN M. LYNHAM

JOHN E. POWELL

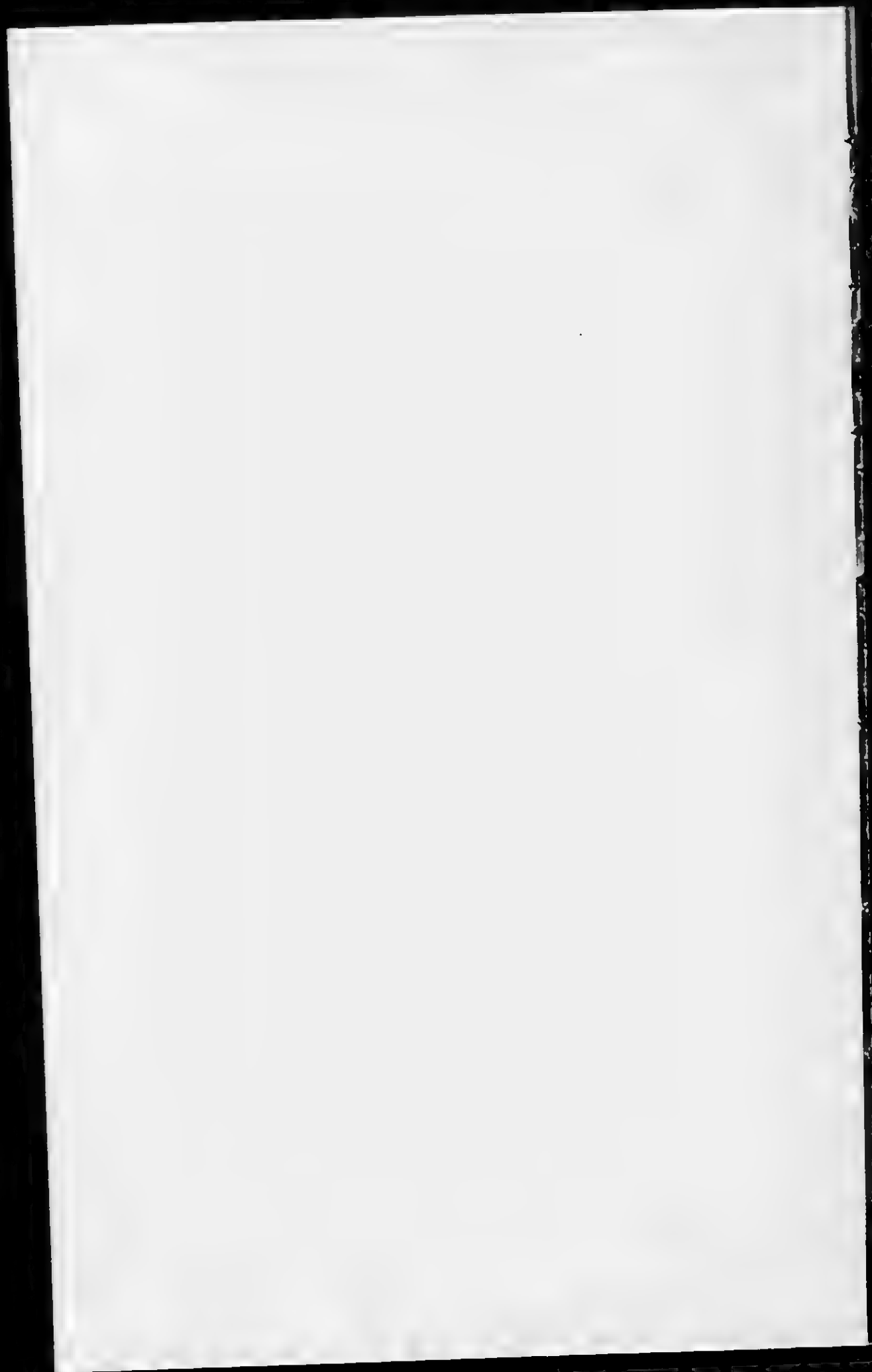
HENRY H. PAIGE

812 Colorado Building

Washington 5, D. C.

Attorneys for Appellee,

National Savings and Trust
Company, Successor Trustee



COUNTERSTATEMENT OF QUESTION PRESENTED

In the opinion of Appellee National Savings and Trust Company, Successor Trustee, the question presented is whether the rights of appellants to the proceeds of a testamentary trust are res judicata, those rights having finally been determined by prior judicial proceedings.

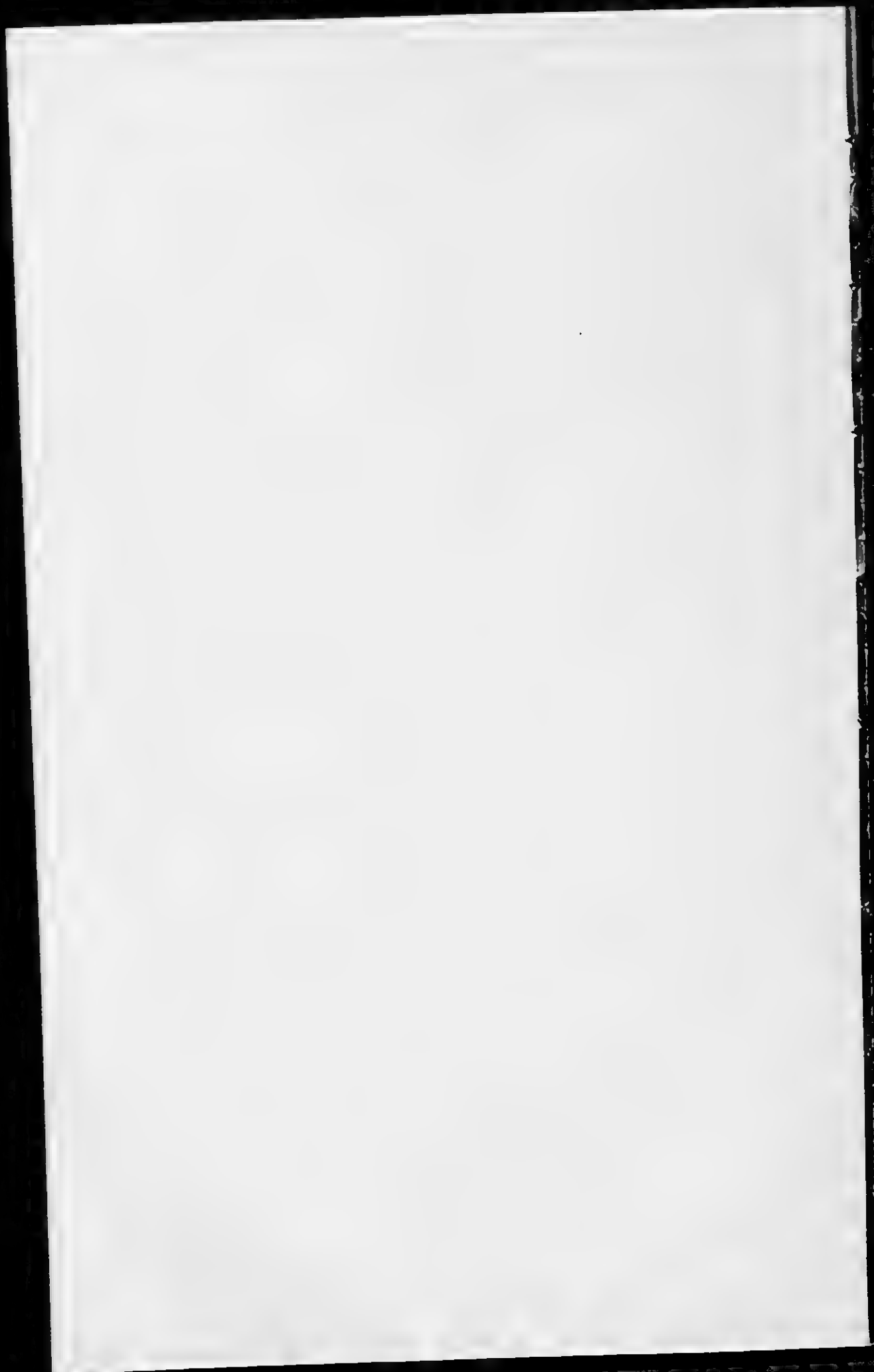


INDEX

	Page
Counterstatement of Case.....	1-5
Summary of Argument.....	5
Argument	5-6
Conclusion.....	7

TABLE OF CASES

<i>Powell v. National Savings and Trust Company,</i> (1961) 111 U.S.App.D.C. 290, 296 F.2d 412, cert. <i>denied</i> 368 U.S. 946.....	4, 6
---	------



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,178

DIANA KEARNY POWELL, *Appellant*

vs.

**NATIONAL SAVINGS AND TRUST COMPANY,
Successor Trustee, *Appellee***

No. 17,181

EMILIA L. POWELL, et al., *Appellants*

vs.

**NATIONAL SAVINGS AND TRUST COMPANY,
Successor Trustee, et al., *Appellees***

**Appeals from Final Orders of the United States
District Court for the District of Columbia**

**BRIEF FOR APPELLEE NATIONAL SAVINGS AND
TRUST COMPANY, SUCCESSOR TRUSTEE**

COUNTERSTATEMENT OF THE CASE

In 1904 Diana Kearny Powell, the grandmother of the appellant Diana Kearny Powell, died a resident of the

District of Columbia, and her will, dated May 25, 1895, and a codicil, dated June 27, 1902, were admitted to probate in Administration No. 12,657. Said decedent hereinafter will be referred to as Testatrix.

Item Fourth of Testatrix' will reads as follows:

All the rest and residue of my estate, real, personal and mixed, of whatever kind and description and wheresoever situate, of which I now am or at the time of my death may be seized and possessed, I give, devise and bequeath unto my said son William Glasgow Powell, and his heirs forever, in and upon the following trusts, viz: first, to collect and reduce into money all the personalty and the same to safely invest, and from such investment and from the realty hereby devised, to collect the profits, income and rents, and after deducting and paying therefrom all costs and charges necessary for the preservation of the property, including taxes, levies, assessments, insurance and repairs, and his own proper expenses and commissions, *secondly*, to pay the net residue in equal parts, semi-annually, to my two daughters, Aimee Elizabeth Powell and Lucy Powell, to each one-half, until the marriage or death of either, whichever event shall first happen, and *thirdly*, upon the marriage or death of one of my said daughters, then and thereafter to pay the whole of said net income, semi-annually, to the other daughter, if alive and unmarried, and after the marriage or death of both daughters, then *fourthly* and *finally* to divide the said property absolutely and in fee, either in kind or by sale and conversion into money, equally between any children now living, viz: the said William Glasgow Powell, Owen Bullett Powell, George Cuthbert Powell, the said Aimee Elizabeth Powell and the said Lucy Powell, the descendants of any who may die before the time of division hereinbefore fixed, to have and take the share of their deceased parents, it being my intention that my said daughters shall have the whole of said net income in equal shares so long as they live and are unmarried, and upon the marriage or death of one, the whole shall then be paid to the other until her marriage or death, when the entire

property is to be equally divided among my children, and the descendants of any deceased child or children as hereinbefore specified.

William Glasgow Powell, the nominated trustee, served as trustee under the aforesaid trust until his death, and thereafter on January 3, 1956, by an order entered by the Court below in Civil Action No. 4051-55, Appellee National Savings and Trust Company, hereinafter referred to as Successor Trustee, was appointed successor trustee of this trust.

The last surviving life tenant died on September 1, 1958, and the proceeds of the trust estate then became distributable to the person or persons entitled thereto. Appellant Diana Kearny Powell filed in said Civil Action No. 4051-55 a motion to compel distribution of the entire trust estate to herself as the sole surviving descendant of Testatrix. From an examination of the terms of said trust, the Successor Trustee was unable to determine whether this contention was correct, or whether a one-fifth ($1/5$) remainder interest in the corpus of said trust became indefeasibly vested in each of the children of Testatrix who died without surviving issue prior to the death of the life tenant. Accordingly, the Successor Trustee in the same proceeding petitioned the Court below for instructions as to whom and the proportions in which the trust estate should be distributed, and joined as parties defendant all known persons having a possible interest therein, including the present Appellants Diana Kearny Powell and Emilia L. Powell (J.A. 12).

Thereafter the matter was heard and on October 5, 1960 an order was entered in the Court below construing the aforesaid trust and instructing the Successor Trustee to make distribution of one-fifth of said trust estate to Appellant Diana Kearny Powell and the remaining four-fifths to the successors in interest of four deceased children of testatrix (J.A. 11). Appellant Emilia L. Powell

R.J. ~~did~~ not appeal from that decision. Appellant Diana Kearny Powell did appeal to this Court, which affirmed (*Powell v. National Savings and Trust Company* (1961), 111 U.S.App.D.C. 290, 296 F.2d 412, cert. denied 368 U.S. 946), the Court stating at page 291:

Appellant seeks review of a judgment of the District Court construing a testamentary trust pursuant to a petition of the trustee for instructions.
* * *

The trustee's request for instructions recited that upon appellant's filing a motion for distribution of the entire estate to herself as the sole surviving descendant of the testatrix, the trustee was unable to determine from the will whether it was to be construed as claimed by appellant or whether it should be construed as giving each of the five children a vested remainder in fee in one-fifth of the trust estate subject to being divested only by his or her death leaving issue prior to the termination of the life estate.

We hold that the will discloses an intent to vest each of the five children with an equal share of the residue "absolutely and in fee," subject only to the life estates of the daughters on the terms described and subject to being divested only if they predeceased the life tenants and were survived by issue.

The United States Supreme Court denied Appellant Diana Kearny Powell's petition for a writ of certiorari on December 18, 1961. Approximately three days later, on or about December 21, 1961, she filed in the Court below in the same proceeding (Civil Action No. 4051-55), purportedly as attorney for Appellant Emilia L. Powell, a motion for summary judgment seeking on behalf of the movant the entire proceeds of the trust estate (J.A. 19). Thereafter, on January 5, 1962, Appellant Diana Kearny Powell filed in the Court below in the same proceeding, this time purportedly as attorney for Elizabeth Powell Adams, also a party to the construction pro-

ceeding, a motion for summary judgment seeking on behalf of the movant the entire proceeds of the trust estate. Concurrently, on or about January 10, 1962, Appellant Diana Kearny Powell, pro se, petitioned the United States Supreme Court for a rehearing on the denial of her petition for a writ of certiorari, asserting that she was entitled to the entire proceeds of the trust estate. This petition was denied on February 19, 1962.

On or about May 17, 1962 Appellant Diana Kearny Powell filed on her own behalf in the old administration proceedings on Testatrix' estate a petition for letters of administration, d.b.n., c.t.a., again seeking the entire proceeds of the trust estate for herself.

Appellant Diana Kearny Powell's petition for letters of administration, d.b.n., c.t.a., was denied by the Court below on June 6, 1962 (J.A. 1). Her appeal No. 17,178 herein is from that order. Appellant Emilia L. Powell's motion for summary judgment was denied by the Court below on June 11, 1962 (J.A. 21). Appeal No. 17,181 herein is from that order and was noted by Appellant Emilia L. Powell, through the offices of Appellant Diana Kearny Powell, as attorney, and also by Appellant Diana Kearny Powell, individually, even though she herself was not a party to the motion.

The motion of Elizabeth Powell Adams for summary judgment was denied on June 19, 1962, and no appeal was taken from that order.

SUMMARY OF ARGUMENT

Appellants' rights with respect to the trust estate in question are res judicata.

ARGUMENT

It is abundantly clear that Appellants rights with respect to the trust estate in question were fully deter-

mined by the Court below by an order entered October 5, 1960. Appellant Emilia L. Powell did not appeal from that determination; Appellant Diana Kearny Powell did appeal but her contentions were not sustained by this Court. *Powell v. National Savings and Trust Company*, supra.

The subsequent motion for summary judgment, filed in the same proceeding on behalf of Emilia L. Powell, and the petition for letters of administration, d.b.n., c.t.a., filed by Appellant Diana Kearny Powell in the old administration proceeding on Testatrix' estate seek to relitigate the same issues. The prior determination clearly bars the present claims and the denial of the motion and petition by the Court below manifestly was correct. It also should be pointed out that Appellant Diana Kearny Powell has no standing to appeal from the order denying Appellant Emilia L. Powell's motion for summary judgment, inasmuch as her purported role in filing the motion was that of an attorney and not a party.

CONCLUSION

Appellant Diana Kearny Powell's actions in filing, as attorney, two motions for summary judgment on behalf of different parties, each asserting on behalf of the movant a right to the entire proceeds of the trust estate, and at the same time asserting in the United States Supreme Court and in the Probate Court her own right to the entire proceeds, represent an attempt to prevent distribution of the trust estate by continuing litigation on matters that have been determined. This Honorable Court should either dismiss the appeals herein as frivolous, or affirm the rulings of the Court below.

Respectfully submitted,

ARTHUR P. DRURY
JOHN M. LYNHAM
JOHN E. POWELL
HENRY H. PAIGE

312 Colorado Building
Washington 5, D. C.

Attorneys for Appellee,
National Savings and Trust
Company, Successor Trustee

BRIEF OF APPELLEES
ANNE T. OGDEN AND LESTER H. SELLERS
Ancillary Executors of the Estate of Lucy Powell, Deceased

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,178

DIANA KEARNY POWELL,

Appellant,

v.

NATIONAL SAVINGS AND TRUST COMPANY,
Successor Trustee,

Appellee.

No. 17,181

EMILIA L. POWELL
and
DIANA KEARNY POWELL,

Appellants,

v.

NATIONAL SAVINGS AND TRUST COMPANY,
Successor Trustee
and

ANNE T. OGDEN and LESTER H. SELLERS,
Ancillary Executors of Estate of Lucy Powell, deceased,

Appellees.

United States Court of Appeals from Final Orders of the United States District Court
for the District of Columbia Circuit

OCT 5 1962

Joseph W. Stewart

CLERK

DOUGLAS, OBEAR
& CAMPBELL
Of Counsel

BENJ. W. DULANY

822 Southern Building
Washington 5, D. C.

Attorney for Appellees

Anne T. Ogden and Lester H.
Sellers, Ancillary Executors
of the Estate of Lucy Powell,
deceased



(i)

COUNTER-STATEMENT OF
QUESTIONS PRESENTED

In the opinion of appellees in Appeal No. 17,181,
Anne T. Ogden and Lester H. Sellers, Ancillary
Executors of the Estate of Lucy Powell, deceased, the
questions presented are, (a) whether the doctrine of
res judicata precludes the appellants from further liti-
gating the construction of the will of Diana Kearny
Powell, deceased, and from claiming the corpus there-
of, and (b) whether the will of Diana Kearny Powell,
deceased, establishes a valid testamentary residuary
trust or in the alternative devises and bequeaths the
residuary estate to William Glasgow Powell in fee free
from any trust.

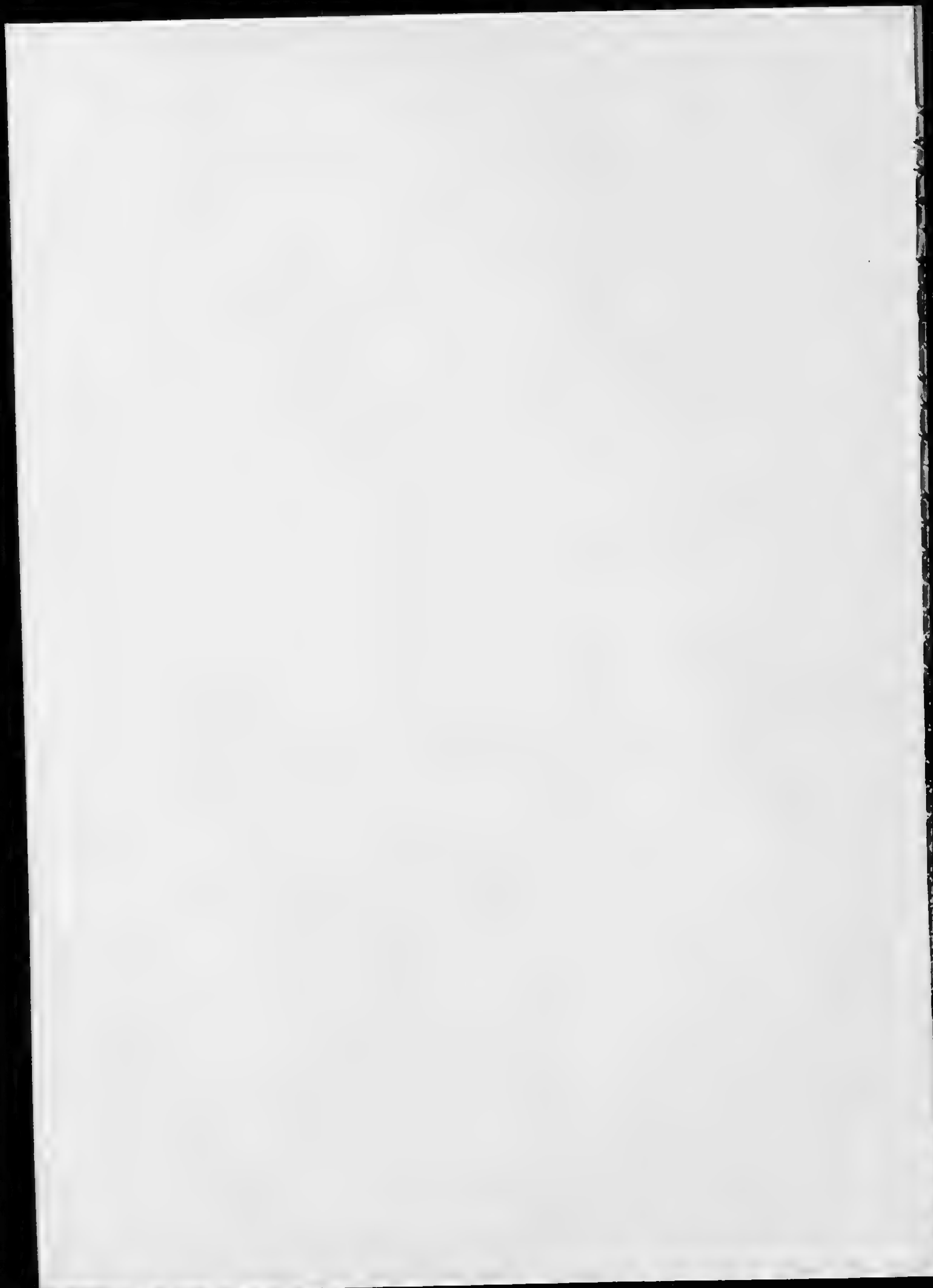


INDEX

	<u>Page</u>
COUNTER-STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	4
CONCLUSION	6

TABLE OF CASES AND AUTHORITIES

Powell v. National Savings and Trust Co., 111 U.S. App. D.C. 290, 296 F. 2d 412	5
Pyne v. Pyne, 81 U.S. App. D.C. 11, 154 F. 2d 297	6
<u>Page on Wills</u> (Lifetime Edition), Section 1176, pages 486, 487	4



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,178

DIANA KEARNY POWELL,

Appellant,

v.

NATIONAL SAVINGS AND TRUST
COMPANY, Successor Trustee,

Appellee.

No. 17,181

EMILIA L. POWELL and
DIANA KEARNY POWELL,

Appellants,

v.

NATIONAL SAVINGS AND TRUST
COMPANY, Successor Trustee, et al,

Appellees.

Appeals from Final Orders of the United States District Court
for the District of Columbia

BRIEF FOR APPELLEES IN NO. 17,181,
ANNE T. OGDEN AND LESTER H.
SELLERS, ANCILLARY EXECUTORS OF
THE ESTATE OF LUCY POWELL, DECEASED

COUNTER-STATEMENT OF THE CASE

This counter-statement is applicable to Appeal No. 17,181 since the appellees, Anne T. Ogden and Lester H. Sellers, Ancillary Executors of the Estate of Lucy Powell, deceased, are parties to that appeal only and are not parties to Appeal No. 17,178.

Diana Kearny Powell died a resident of the District of Columbia in 1904 leaving a last will and testament dated May 25, 1895, and a codicil thereto dated June 27, 1902, which were duly admitted to probate and record in the District of Columbia on January 9, 1905, in Administration No. 12,657 (J.A. 6, 7). Testatrix by said will named her son William Glasgow Powell as Trustee of her residuary trust and upon the completion of the administration of said estate the nominated Trustee took possession of the residuary estate and so acted as Trustee until his death on May 11, 1955 (J.A. 7, 8). Thereafter, in an action in the United States District Court for the District of Columbia (Civil Action No. 4051-55) brought by the life beneficiary Lucy Powell, the National Savings and Trust Company was appointed Successor Trustee. Upon the death of the said Lucy Powell as surviving life beneficiary, the United States District Court for the District of Columbia in said Civil Action No. 4051-55 permitted the Successor Trustee to add as parties defendant all possible claimants to the corpus of said residuary trust and to seek a construction of the will with reference to the proper distribution of said corpus (J.A. 18, 19). Appellant Emilia L. Powell (widow of William Glasgow Powell) and Diana Kearny Powell were named as parties defendant and filed answers to the petition of the National Savings and Trust Company for the construction of the will of Diana Kearny Powell, deceased, as aforesaid (J.A. 14, 15). Appellees Anne T. Ogden and Lester H. Sellers, duly appointed Ancillary Executors of the Estate of Lucy Powell, deceased, in Administration No. 96,790 in the District of Columbia, were named parties defendant in the construction action and filed an answer to the said petition of the Successor Trustee for instructions (J.A. 12).

On October 5, 1960, the court below, upon consideration of the cross motions for summary judgment filed by the National Savings and Trust Company as Successor Trustee and by Diana Kearny Powell, pro se, claiming the entire corpus of the trust for herself in fee, entered an order construing the will of Diana Kearny Powell, deceased (J.A. 11). Under said construction Diana Kearny Powell was entitled to 4/20ths of the corpus of the said trust in fee and the Estate of Lucy Powell was entitled to 9/20ths of the corpus of the trust. Diana Kearny Powell is a residuary life beneficiary under the will of Lucy Powell with remainder to her issue.

Appellant Emilia L. Powell did not appeal from the decision of the court below entered October 5, 1960, but Diana Kearny Powell, pro se, did appeal claiming for herself the entire corpus of the trust estate in fee. The decision of the District Court was sustained (111 U.S. App. D.C. 290), petition for rehearing en banc denied, petition for writ of certiorari denied and petition for rehearing of petition for writ of certiorari denied.

Thereafter, Diana Kearny Powell, purportedly acting as counsel for appellant Emilia L. Powell, and advocating a construction contrary to her own financial interest, filed a motion for summary judgment in which appellant Emilia L. Powell claimed the entire corpus of the trust estate in fee (J.A. 20). This appeal is from the denial of said motion for summary judgment.

Thereafter, Diana Kearny Powell, purportedly as counsel for her cousin Elizabeth Powell Adams, and advocating a construction contrary to her own financial interest and the financial interest of Emilia L. Powell, filed a motion for summary judgment in which Elizabeth Powell Adams claimed the entire corpus of the trust estate in fee. No appeal was taken from the denial of this motion.

The opposition of these appellees to said motions for summary judgment was based primarily upon the doctrine of res judicata.

SUMMARY OF ARGUMENT

1. The language of the will of Diana Kearny Powell, deceased, clearly establishes a valid testamentary residuary trust and not an outright bequest or devise in fee simple to William Glasgow Powell.
2. The doctrine of res judicata precludes the appellants from now claiming the corpus of the trust estate.

ARGUMENT

There never has been and there cannot now be any question that the will of Diana Kearny Powell, deceased, established a valid residuary trust by its expressed terms. The will in pertinent part states at Article III:

"* * * I give and devise the above described property in Cape May, New Jersey, * * * unto my son WILLIAM GLASGOW POWELL, and his heirs forever, in and upon the trusts, hereinafter declared in the next succeeding and residuary clause hereof" (J.A. 2).

and at Article IV:

"All the rest and residue of my estate, real, personal and mixed, of whatsoever kind and description and wheresoever situate, of which I now am or at the time of my death may be seized and possessed, I give, devise and bequeath unto my said son WILLIAM GLASGOW POWELL and his heirs forever in and upon the following trusts, viz. * * * " (Emphasis added) (J.A. 2, 3).

There are three basic conditions necessary to the creation of a valid testamentary trust:

"To create a valid trust there must be words which show the testator's intention to create it; a definite res, and an object which is sufficiently certain * * * To create a trust by will, the language of the will when taken as a whole and read in the light of surrounding circumstances, must show that testator intended to pass a legal estate to the trustee and the equitable estate to the cestui que trust." PAGE ON WILLS, Lifetime Edition, Section 1176, pages 486, 487.

These basic conditions are fully met as can readily be seen from even a superficial reading of the will in question.

Appellant Emilia L. Powell was a party defendant in the proceedings in the court below which resulted in the construction of the will of Diana Kearny Powell, deceased. She filed, or there was filed on her behalf by Diana Kearny Powell, purportedly as her counsel, more than nineteen separate pleadings including a sworn answer, motions, cross-claims, objections, exceptions and oppositions. Appellant Emilia L. Powell did not appeal from the final decision of the District Court construing the will of Diana Kearny Powell, deceased, although her present counsel did so appeal, pro se, claiming for herself the entire corpus of the trust estate. This court having affirmed the final decision of the District Court (Powell v. National Savings and Trust Company, 111 U.S. App. D.C. 290), said decision is final and binding on appellant as a party thereto. Emilia L. Powell and Diana Kearny Powell are now barred from relitigating ad infinitum the construction of the will of Diana Kearny Powell, deceased, under the doctrine of res judicata which is clearly applicable.

In an attempt to circumvent the doctrine of res judicata appellant contends that by seeking to have the residuary trust declared invalid, she is merely enforcing the prior opinion of this court (Powell v. National Savings and Trust Company, supra). This contention is without merit. The opinion throughout assumes, as it must, a valid and existing testamentary residuary trust and concerns itself with the proper distribution of the corpus thereof.

"BURGER, Circuit Judge: Appellant seeks review of a judgment of the District Court construing a testamentary trust pursuant to a petition of the trustee for instructions.

* * * * *

"The trustee's request for instructions recited that upon appellant's filing a motion for distribution of the entire estate to herself as the sole surviving descendant of the testatrix, the trustee was unable to determine from the will whether it was to be construed as claimed by

"appellant or whether it should be construed as giving each of the five children a vested remainder in fee in one-fifth of the trust estate subject to being divested only by his or her death leaving issue prior to the termination of the life estate.

'We hold that the will discloses an intent to vest each of the five children with an equal share of the residue 'absolutely and in fee,' subject only to the life estates of the daughters on the terms described and subject to being divested only if they predeceased the life tenants and were survived by issue.

"In Pyne v. Pyne, 81 U.S. App. D.C. 11, 154 F. 2d 297 (1946), we held that unless both conditions, death of the remainderman during the preceding life estate and survival of issue of the deceased remaindermen are met, the remainderman has a vested interest which passes by his will or by statute as the case may be. * * * " (J.A. 17, 18).

There is nothing in this opinion which in any way questions the validity of the testamentary trust or forces the conclusion that it is in fact invalid. The clear intention of the testatrix as read from the language of the will as a whole is to establish a testamentary residuary trust and this intention is given effect by the court's opinion.

CONCLUSION

In conclusion, the will of Diana Kearny Powell, deceased, clearly establishes a valid residuary testamentary trust and appellant is barred by the doctrine of res judicata from further relitigating the construction of said will with respect to the distribution of the corpus of said trust.

Respectfully submitted,

BENJAMIN W. DULANY

822 Southern Building
Washington 5, D. C.

Attorney for Appellees

Anne T. Ogden and Lester H.
Sellers, Ancillary Executors
of the Estate of Lucy Powell,
deceased.

DOUGLAS, OBEAR & CAMPBELL
Of Counsel

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 7 1963

Nathan J. Paulson
CLERK
United States Court of Appeals

No. 17,178

DIANA KEARNY POWELL,

Appellant,

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor
Trustee, and

ANNE T. OGDEN and LESTER H. SELLERS, Executors
of the Estate of Lucy Powell, deceased,

Appellees.

No. 17,181

EMILIA L. POWELL and
DIANA KEARNY POWELL,

Appellants,

v.

NATIONAL SAVINGS AND TRUST COMPANY, Successor
Trustee, and

ANNE T. OGDEN and LESTER H. SELLERS, Executors
of the Estate of Lucy Powell, deceased,

Appellees.

Appeals from Judgment of the United States
District Court for the District of Columbia

PETITION FOR REHEARING EN BANC

Petitioners Emilia L. Powell and Diana Kearny Powell hereby
petition this Honorable Court for a rehearing en banc of appeal from
judgments of the United States District Court rendered in Administra-
tion No. 12,657 on June 6, 1962, and in CA 4051-55 on June 11, 1962,

and affirmed on appeal by this Court in Nos. 17178 and 17181 on January 24, 1963, and in support thereof show:

I.

In Appeal No. 17,178, affirmance of denial of appellant Diana Kearny Powell's petition for letters of administration d.b.n., c.t.a. in the administration of the estate of her grandmother, Diana Kearny Powell, widow, deceased, Administration No. 12657, is based on the premise that no abuse of discretion is found in the record. Appeal was taken on the statutory right under 20 District of Columbia Code, Secs. 20-103 and 20-205, granting the right under similar factual circumstances to a granddaughter, and the decisions of this Court summarized in Haviland v. Harriss, 60 App. D.C. 255, 50 F.2d 1069, as follows:

"... if there is a next-of-kin who is not barred under a specific statutory disqualification and who applies for letters, a creditor or person not in any preferred classification may not be appointed."

No claim has been made by appellees that petitioner was under any statutory disqualification. Appellant submits that the decision in the present case deprives her of a statutory right in violation of Amendment 5 of the Constitution of the United States.

II.

In Appeal No. 17181, affirmance of the District Court's denial of a motion for summary judgment for Emilia L. Powell is based on the principle of res judicata in the decision in Powell v. National Savings and Trust Company, et al., No. 16071 in this Court, 111 U.S. App. D.C. 290, 296 F.2d 412, cert. denied 368 U.S. 946 (1961). The appeal of Emilia L. Powell (with whom Diana Kearny Powell is joined) is taken on the denial by the District Court entered June 11, 1962, of rights vested in William Glasgow Powell by a clause in the will of Diana Kearny Powell, deceased, (Administration No. 12657), and not determined in the above-cited decision.

The cited decision cannot be res judicata of the rights here claimed for two reasons:

1. The earlier decision was obtained by fraud (i.e., deliberate misrepresentation to the Court of the known purport of the will by the trustee and other parties, whose only status in the case was based upon the clause which they now seek to evade. The authorities agree that a decision obtained by fraud or misrepresentation cannot be the basis of res judicata, for this would be lending the processes of the Court to perpetrate fraud. Guam Inv. Co. Inc. v. Central Building, Inc., 288 F.2d 19, CA 9th 1961, and cited cases; New Orleans v. Gaines (New Orleans v. Whitney), 138 U.S. 595, 34 L.Ed. 1102, 11 S.Ct. 428, Welch v. Mandeville (U.S.) 1 Wheat. 233, 4 L.Ed. 79, and cited cases.

2. The decision in Powell v. National Savings and Trust Company, et al., (No. 16071) supra, is completely silent on the rights vested by the clause under which this appeal is taken, but for the first time in fifty years challenges the rights under the clause establishing the trust by imputing to vested future interests in remainder, predicated to take effect on termination of the trust established by the clause, and inconsistent with the grant to the trustee, the attributes of a vested present estate in fee absolute as would have vested on the death of testatrix in 1904, i.e., the right of final alienation of the estate by will prior to the termination of the trust and prior to the vesting of the remainder estates in possession. The decision deprives Emilia L. Powell, as widow and devisee and legatee of William Glasgow Powell, in violation of Amendment 5 of the Constitution of the United States, rights granted by the clauses hitherto assumed as vesting in him only as trustee and not as remainderman, although he is specifically named both as trustee and remainderman. The decision, by accelerating the final vesting of the remainder estate with full rights of alienation of the fee by will prior to termination of the preceding trust, in effect eliminates the trust, and establishes William Glasgow Powell's rights as remainderman as of 1904. The elimination

of the trust raises the question of good faith and fraud in a position of trust and confidence on the part of the Successor trustee, whose only status to participate in the case is derived from the clause which they seek now to evade, and of the executors of the estate of Lucy Powell, deceased, who also being agents of the successor trustee, and claiming the proceeds of the trust estate over a period of fifty years, now claim the right of final alienation as having existed in the named remaindermen from the beginning, in conflict with the clause purportedly vesting the rights of alienation only in the trustee during the life of the trust. Since these rights were granted specifically only to William Glasgow Powell and were awarded to him by Court order in the early administration of the estate, the omission of this clause from consideration of the Court in Powell v. National Savings and Trust Company, et al., (case No. 16071) was caused by mistake of the Court induced by the fraud and misrepresentation of the Successor Trustee in a position of trust, and by the fraud of other parties, and therefore cannot be res judicata.

WHEREFORE, petitioners pray that rehearing en banc be granted in both Case No. 17,178 and Case No. 17,181.

DIANA KEARNY POWELL

1500 Massachusetts Ave., N.W.
Washington 5, D.C.

Attorney for Appellants

CERTIFICATE

Diana Kearny Powell, counsel for appellants, a member in good standing of the bar of this Court, does certify that this Petition for Rehearing en banc is presented in good faith and not for the purposes of delay and respectfully requests oral argument on this petition if the Court will grant the same.

Diana Kearny Powell
1500 Massachusetts Ave., N.W.
Washington 5, D.C.
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petition for Rehearing en banc have been served by personal service at the offices of counsel of record for the appellees, Henry H. Paige, Esq., Drury, Lynham and Powell, 312 Colorado Building, Washington 5, D.C., attorneys for the National Savings and Trust Company, Successor Trustee; Benjamin W. Dulany, Esq., 822 Southern Bldg., Washington 5, D.C., attorney for the executors of the estate of Lucy Powell, deceased; Nathan Wald, Esq., ^{927-15th St.} ~~1129 Vermont Ave.~~, N.W., Washington 5, D.C., attorney for certain other appellees, this 6th day of February, 1963.

Diana Kearny Powell

APPENDIX

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 17178

DIANA KEARNY POWELL, Appellant

v.

NATIONAL SAVINGS AND TRUST COMPANY, et al., Appellees

No. 17181

EMILIA L. POWELL and DIANA KEARNY POWELL, Appellants

v.

NATIONAL SAVINGS AND TRUST COMPANY, et al., Appellees

Appeals from the United States District Court
for the District of Columbia

Decided January 24, 1963

* * * * *

Before Edgerton, Burger and Wright, Circuit Judges.

Per Curiam: The appeal in No. 17178 is from the judgment of the District Court denying appellant's petition for letters of administration d.b.n., c.t.a. We have examined the record and find no abuse of discretion.

In No. 17181, appeal is taken from the District Court's denial of a motion for summary judgment in which appellant Emilia L. Powell claimed the entire corpus of the trust estate in fee. We hold that appellant's rights with respect to the trust estate are res judicata by our decision in Powell v. National Savings and Trust Company, 111 U.S. App. D.C. 290, 296 F.2d 412, cert. denied, 368 U.S. 946 (1961).

The judgments in Nos. 17178 and 17181 are

Affirmed.

